UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

- -x

In the Matter of:

DELPHI CORPORATION, ET AL.,

Debtors.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

December 1, 2008

10:56 a.m.

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

EXPEDITED Motion for Order Authorizing Debtors to Enter Into (I) Second Amendment to Arrangement With General Motors Corporation Approved Pursuant to Second DIP Extension Order, and (II) Partial Temporary Accelerated Payment Agreement With General Motors Corporation

EXPEDITED Motion for Order (I) Supplementing January 5, 2007 DIP Refinancing Order and Authorizing Debtors to Enter Into and Implement Accommodation Agreement With Agent and Participating Lenders, and (II) Authorizing Debtors to (a) Enter Into Related Documents, and (b) Pay Fees in Connection Therewith

Transcribed By: Esther Accardi

A P P E A R A N C E S :

SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
Attorneys for Debtors
333 West Wacker Drive
Chicago, Illinois 60606

BY: JOHN WM. BUTLER, JR., ESQ.
ALBERT HOGAN, ESQ.

SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
Attorneys for Debtors
Four Times Square
New York, New York 10036

BY: KAYALYN A. MARAFIOTI, ESQ.

LATHAM & WATKINS, LLP
Attorneys for Creditors' Committee
885 Third Avenue
New York, New York 10022

BY: ROBERT J. ROSENBERG, ESQ.

MICHAEL RIELA, ESQ.

A P P E A R A N C E S : (continued)

FRIED FRANK HARRIS SHRIVER & JACOBSON, LLP
Attorneys for Official Committee of
Equity Security Holders
One New York Plaza
New York, New York 10004

BY: BONNIE STEINGART, ESQ.

COOLEY GODWARD KRONISH, LLP
Attorneys for Greywolf Capital Management
1114 Avenue of the Americas
New York, New York 10036

BY: RONALD R. SUSSMAN, ESQ.

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Attorneys for Tranche C Collective
51 Madison Avenue
New York, New York 10010

BY: SUSHEEL KIRPALANI, ESQ.

RICHARD I. WERDER, JR., ESQ.

A P P E A R A N C E S : (continued)

HAYNES AND BOONE, LLP
Attorneys for Calyon NY Branch
1221 Avenue of the Americas
New York, New York 10020

BY: JUDITH ELKIN, ESQ.

WINSTON & STRAWN, LLP
Attorneys for Certain A and B Lenders
200 Park Avenue
New York, New York 10166

BY: DAVID NEIER, ESQ.

ANDREWS KURTH, LLP
Attorneys for M.D. Sass
450 Lexington Avenue
New York, New York 10017

BY: PAUL SILVERSTEIN, ESQ.

A P P E A R A N C E S : (continued)

DAVIS POLK & WARDWELL

Attorneys for JPMorgan Chase

450 Lexington Avenue

New York, New York 10017

BY: BRIAN M. RESNICK, ESQ.

DONALD S. BERNSTEIN, ESQ.

MICHAEL S. FLYNN, ESQ.

KARIN S. DAY, ESQ.

P R O C E E D I N G S

THE COURT: Please be seated. Okay. Delphi Corporation.

MR. BUTLER: Your Honor, good morning. Jack Butler, Kayalyn Marafioti and Al Hogan here on behalf of Delphi Corporation for the continuation of it's thirty-seventh omnibus hearing. This hearing commenced on November 24th. We disposed with the first three items on the agenda at that time and Your Honor continued items 4 and 5 to today's hearing. So with Your Honor's permission we'll just continue with the agenda.

THE COURT: That's fine.

MR. BUTLER: Your Honor, the next matter on the agenda is item number 4. This is the GM arrangement second amendment agreement approval motion. This is filed at docket number 14409. No objections have been filed to this matter and it's on the uncontested docket.

Your Honor, this is an agreement that -- two agreements. We're asking for approval of two agreements that would provide up to 600 million dollars of additional liquidity to the debtors through the second quarter of 2009.

The first of these agreements is an amendment to the existing arrangement between the debtors and GM, pursuant to which GM has extended significant liquidity to the debtors. This is the second amendment to that arrangement that we brought before this Court. The arrangement was originally

approved by the Court as part of the second DIP extension order entered on April 30, 2008 at docket number 13489. And, again, a first amendment to the arrangement was approved on September 26th at docket number 14289.

The second agreement, Your Honor, that is part of this motion, covers a partial temporary acceleration of certain trade payable accounts by GM in early 2009. Your Honor, in terms of the record in this case, we do have thirteen items that are in the exhibit book. They include a declaration of Keith Stipp in support of the arrangement. The court documents concerning the approval of the motion has been approved and the prior arrangements. There are no objections, Your Honor, I'd like to move admission of Exhibits 1 through 13.

THE COURT: Okay. Any objection to their admission?

All right, they're admitted.

MR. BUTLER: Your Honor, I don't know whether Your Honor had any questions of Mr. Stipp in connection with his declaration?

THE COURT: No, I don't.

MR. BUTLER: Your Honor, in terms of the merits of the relief that's requested, I'm going to rely on the papers that we had submitted in connection with these two matters. I would point out to Your Honor, if Your Honor approves this, that one of the conditions for this becoming effective would be

GM's satisfaction with the outcome of the accommodation agreement hearing. GM has approved the accommodation agreement as it was posted on November 26th. But they will not deliver their signatures pages and close this agreement until they're satisfied that the accommodation agreement, if approved by Your Honor, is in the form that they have approved.

THE COURT: Okay. But that's the only way that this motion is contingent upon the other motion?

MR. BUTLER: That is correct, Your Honor.

THE COURT: Okay. Does anyone have anything to say in connection with this motion, the GM motion? All right. And do you have anything more to say on it?

MR. BUTLER: I have nothing else, Your Honor.

THE COURT: In light of the averments in the motion and its supporting declaration, as well as the absence of any objection to the relief sought in the motion, then my conclusion that the debtor has set forth good business reasons for entry into this agreement with GM, I'll approve the motion.

MR. BUTLER: Thank you, Your Honor.

Your Honor, the other matter on the docket today is on a contested docket. It is the debtors' accommodation motion, filed at docket number 14408.

There are five objectors that are before the Court today intending to pursue objections. They are the Tranche C Collective objections, Mr. Kirpalani is here in Court. For

Greywolf Capital -- their original docket number was 14459 and they have submitted a supplemental objection as well over the weekend. Greywolf Capital Management, LP, at docket number 14460 is represented by Mr. Sussman. M.D. Sass Re/Enterprise Portfolio Company, LP at docket number 14464 is represented by Mr. Silverman. Calyon New York Branch at docket number 14467 is represented by Ms. Elkin. And, finally, there is an A & B lender group represented by Mr. Neier, and they're objection is at docket number 14472.

Your Honor, since last week, last Monday, we have done what we have indicated to the Court we would do, which is continue discussions between the Tranche A and B lenders and GM, and the company, and the administrative agent, sorting out what modifications ought to be made to the accommodation agreement in order to have support from those groups. That form of accommodation agreement was filed on November 26th. The parties had until this morning at 9 a.m. to reaffirm their position with respect to the administrative agent. The debtors were advised, immediately prior to the commencement of this hearing, that 68.37 percent, more than two-thirds of the Tranche A and B lenders, have both submitted signature pages and reaffirmed those signature pages, based on the accommodation agreement that was filed on November 26th on Interlink with the banks and filed here in the Bankruptcy Court that evening.

Your Honor, I also understand that certain of the objectors that were in either the Tranche A/B objector group or in the Tranche C objector group have, in fact, submitted signature pages and reaffirmations indicating their support of the agreement. I'll not name them on the record. I don't think it's -- I just indicate that to Your Honor. There are remaining members of those two groups that are pursuing their objections today. And, therefore, I don't think that a change is the ability of those groups to move forward. They're just moving forward with slightly fewer members as we sit here today.

Your Honor, because this is a contested matter and based on our past practice, I'm going to move to the evidentiary portion of the hearing and reserve comments until later unless the Court has any questions.

THE COURT: No, that's fine.

MR. BUTLER: Your Honor, normally what we would do is deal with the revised -- the joint exhibit list index. I'll address that now. I don't believe there are any objections to it. There are 129 exhibits that are part of the joint exhibit list. They include Mr. Sheehan's original and supplemental declarations, the accommodation agreement documents, various presentations to Delphi's board of directors and statutory committees, documents related to the commodity financial hedging agreements between the debtors -- the debtors have,

certain SEC filings and agreements with General Motors, and various court documents that apply to the debtor-in-possession facility. We also have noted, as Exhibit 56, Mr. Sheehan's deposition transcript, which has been submitted. There is a series of designations that have been designated by the objectors. And demonstrative exhibits from both parties as well as additional designations and supplemental exhibits that were designated over the last week since the past hearing.

Your Honor, I believe there are no objections to those. Obviously, the demonstratives and the presentations to committees and so forth come in as they have before, not for the truth asserted in those, but rather as evidence of what was presented at that time.

THE COURT: Okay. Does anyone have any objection to the admission of those exhibits?

MR. KIRPALANI: No, Your Honor.

THE COURT: All right. I'll admit them in.

(Debtors' Exhibit 1 through 130 were hereby received into evidence, as of this date.)

MR. BUTLER: Your Honor, then the only witness -- there are no declarations from any of the objectors. The only declaration is that of Mr. Sheehan, the company's chief financial officer. His declaration's Exhibit Number 1, is his original declaration dated November 11, 2008. And Exhibit 111 is his supplemental declaration dated November 30, 2008. And,

Your Honor, I'd move -- those have been admitted, but subject to cross examination any questions Your Honor may have. So I'd make Mr. Sheehan available for any cross examination.

THE COURT: Okay. Does anyone want to cross examine Mr. Sheehan?

MR. WERDER: Yes, Your Honor. Rick Werder from Quinn Emanuel for the Tranche C Collective.

THE COURT: Okay. Why don't you take a seat up here, Mr. Sheehan.

MR. KIRPALANI: Your Honor, can I also just clarify one thing? It's Susheel Kirpalani from Quinn Emanuel for the record.

Pursuant to discussions with Mr. Hogan, dating back over a week ago, we reserve the right to call one or two rebuttal witnesses to the extent that it is necessary following cross examination, based on deposition testimony that we have, Your Honor.

THE COURT: Okay.

(Witness is sworn)

THE COURT: For the record, would you spell you name?

THE WITNESS: John, J-O-H-N, Sheehan, S-H-E-E-H-A-N.

THE COURT: You can go ahead.

MR. WERDER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WERDER:

Q. Good morning, Mr. Sheehan. Good to see you again.
A. Good morning.
Q. How are you today?
A. Very good, thanks.
Q. This hearing was originally scheduled for last Monday, was it not?
A. Yes, it was.
Q. And it was postponed because General Motors asked Delphi to reconsider certain provisions of the accommodation agreement, correct?
A. Yes, sir.
Q. When did GM request that postponement?
A. Over the course of the weekend, prior to last Monday.
Q. And at the time that GM requested the postponement, had it received the debtor projections that you and your counsel delivered to us at the start of your deposition on November 23rd?
A. Yes, sir.
Q. And what did those projections show with respect to when GM would be required to start funding its commitments under the then existing language of the accommodation agreement?
A. I don't have it in front of me, but I believe it may have required as early as December of 2008.
Q. I think there's a set of exhibits behind you. Can you see if you can find Exhibit 97?

(Pause)

Q. Do you have that exhibit now?

A. Yes, I do.

Q. And can you identify that as the set of projections that were prepared over the weekend of November 23rd and 24th and delivered to the objectors at the start of your deposition on the 24th?

A. Yes, sir. Although, I think the deposition was on the 23rd.

Q. Oh, correct. It was the 22nd and the 23rd, you're absolutely right. It was Sunday the 23rd that you were deposed, correct?

A. Yes, sir.

Q. And these are the projections that GM had access to over the weekend when it advised you that it wanted to reopen discussions of the accommodation agreement?

A. Yes, sir.

Q. And if we look at the page that -- the first page of data, there are three columns there, you see that?

A. Yes, sir.

Q. And talking about the middle column which is labeled accommodation model, is that the November 17, 2008 accommodation model prepared by the debtors?

A. Yes, sir.

Q. And that was the model that was being used prior to the --

prior to some revisions that were done over the weekend of the 22nd and 23rd, correct?
A. Yes, sir.
Q. And does the first column reflect the changes to the projections that were made over the weekend of 22nd and 23rd?
A. It represents a reforecasting that we did that weekend, yes.
Q. And just focusing on a few of the lines of the exhibit, the reforecasting indicated -- does it indicate a change in October opening cash?
A. Yes, sir.
Q. Does it also indicate a change in the cash required by the debtors' operations during October of 2008?
A. Yes, sir.
Q. And it indicates several other changes from the original model that was used on November 17th, as well, does it not?
A. Yes, sir.
Q. And the net result of the changes is to significantly increase the cash outflows during October of 2008, correct?
A. It increases the cash flows by 108 of eighty-five million dollars.
Q. And the result of all the changes that occurred between November 17th and November 23rd was that October closing cash and November opening cash dropped by 230 million dollars, correct?

A. Yes, sir.
Q. And if we look down to December, December has a line that is labeled GM draw, do you see that?
A. Yes, sir.
Q. And the GM draw, is that a draw under the 300 million dollar facility that was just presented to the Court and approved in Mr. Butler's presentation?
A. Yes, sir. I believe that there's an existing facility in place. The facility that was just approved by the Court is the one for January 1 through June 30th of 2009. But there is a similar facility that's in place in December -- today and through December 31.
Q. Regardless of which facility it's under they're both 300 million dollar facilities, correct?
A. Yes, sir. I was just trying to be --
Q. Okay. And the original model that was presented on November 17th showed no draw on that facility in December of 2008, correct?
A. Yes, sir.
Q. And the projections that were prepared approximately a week later showed a requirement of approximately 102 million dollars in December of '08 from General Motors, did it not?
A. Yes, sir.
Q. When GM received this revised set of projections showing a requirement for funding from GM of 102 million in December of

2008, did they raise issues with you concerning that projection?

A. Yes, sir.

Q. And in particular, did they raise issues concerning the aspect of the projection that indicated that their funding obligation would kick in in December of 2008?

A. Yes, sir.

Q. Were there concerns raised in those discussions concerning GM's ability to provide that funding at that time?

A. General Motors indicated to us that they were concerned about -- given the state of the industry and all that was going on that Delphi needed to be preserving all of the liquidity it possibly could and to be delaying the use of their facility as long as possible, yes.

Q. And in connection with that indication from GM were there issues discussed concerning GM's own liquidity and GM's ability or willingness to provide that funding on that schedule?

A. GM pointed out to us that their own liquidity issues were well publicized in the public.

Q. And so GM's liquidity issues were raised as a concern with respect to this revised forecast for November 23rd, were they not?

A. It was one aspect of the discussions, yes.

Q. And there was an issue that was raised concerning whether or not GM would, in fact, have available the liquidity to

provide that 102 million dollars that was projected to be needed in December of 2008, correct?

A. GM indicated to us that their own liquidity planning had not contemplated providing this liquidity to us in December.

Q. And did they also indicate in addition to the fact that their planning had not contemplated it, that their liquidity position did not permit it, or that it would be problematic to their liquidity position to provide it?

A. I would agree with your second statement that it would be problematic.

Q. At the very least they indicated that it would be problematic for them to provide 102 million dollars of funding under the agreement in December of 2008, correct?

A. I think that's consistent with the fact that their statement to me that their, General Motors' liquidity -- current liquidity issues are well publicized.

Q. And the agreement that you were discussing with them at the same time that you were discussing the accommodation agreement, calls for them to provide 300 million of liquidity, does it not?

A. I'm sorry, I didn't understand that question.

Q. You have an agreement with GM that you were discussing at the same time that you were discussing the accommodation agreement that calls for GM to provide 300 million dollars -- up to 300 million dollars of liquidity, correct?

A. Yes, sir.
Q. And your current projections based upon the amended or revised accommodation agreement show the first payment being made -- projected to be made under that facility in February of 2009, correct?
A. Yes, sir.
Q. And that's eight-five million dollars that's projected to be drawn under the GM facility in February of '09, correct?
A. It's approximately that. I don't have it in front of me, but it's in that ballpark.
Q. And there's another 105 million projected to be drawn, approximately, in March of '09, correct?
A. Yes, sir.
Q. So that by March 31st of 2009 your current projections call for you to be drawing approximately 190 million dollars under the GM 300 million dollar facility, correct?
A. Yes, sir.
Q. Is Delphi, as a result of its negotiations with General Motors, is Delphi getting any collateral or security to secure GM's obligation to provide that 300 million dollars of liquidity?
A. No, sir.
Q. And can you tell us -- can you tell the Court what due diligence Delphi has performed to verify that GM's liquidity position which was problematic as to 102 million dollars in

December of 2008 will, in fact, allow it to provide that 190 million dollars of liquidity by the end of the first quarter of 2009?

A. Make that General Motors is -- through our discussions with General Motors, we understand that they are taking all actions that they can to preserve liquidity. I think that it's been well documented in the public that those actions include discussions in Washington. And we have -- we understand that they are working to preserve liquidity and to honor the obligations that they have to all parties, including Delphi.

Q. Was there any formal due diligence effort that was commenced by Delphi on GM in connection with assuring Delphi and its stakeholders that the 300 million dollars would, in fact, be available?

A. Nothing specific, no.

Q. Okay. Let me ask you if you could get in front of you Exhibit 111, which is your revised declaration.

(Pause)

Q. I should say your supplemental declaration, not your revised declaration. Do you have that?

A. Yes, sir.

Q. And the copy that we received had an electronic signature and it's dated November 30th of 2008. When did you, in fact, sign off on this declaration?

A. Yesterday afternoon.

Q. Okay. If I could direct your attention to paragraph 11 of the supplemental declaration. And paragraph 11 says, among other things, and it describes the signature pages and your procedures with respect to that. But it says that the -- in about the middle of the paragraph it has a phrase "the changes were less favorable to the lenders than the accommodation agreement as it previously existed," do you see that?

A. Yes, sir.

Q. And that's a true statement, is it not?

A. Yes, sir.

Q. The accommodation agreement that's currently being proposed is less favorable to the lenders than the accommodation agreement that was tentatively before the Court last week, correct?

A. Yes, sir.

Q. And among other things -- and it's less favorable to the Tranche C lenders, who are my clients, is it not?

A. I don't know that I distinguish between one category of lenders versus another.

Q. Well, you had some negotiations with the Tranche C -- with representatives of the Tranche C lenders in the weeks leading up to this hearing, did you not?

A. Yes, sir.

Q. And you understood that one of the things that the Tranche C lenders wanted to see happen was to have the Tranche A and

Tranche B paid down to the maximum extent possible, correct?

A. Yes, sir.

Q. And, in fact, under the amended -- the revised accommodation agreement that's presently before the Court, the Tranche A and the Tranche B balances remain at higher levels than they would have remained under the agreement that was tentatively before the Court last week, correct?

A. Yes, sir.

Q. Have you calculated what the difference is in terms of the amount of the A and B balances that remains outstanding?

A. Upon the effectiveness of the accommodation agreement?

Q. Well, upon the effectiveness or -- let's say at December 31st of 2008, it's true, is it not, that under the old model there would have been 716 million dollars of Tranche A and Tranche B loans outstanding -- loan balance outstanding as of December 31st, correct?

A. Yes, sir.

Q. And under the new model you leave 877 million dollars of Tranche A and Tranche B outstanding, correct?

A. Yes, sir.

Q. And that's a difference of 161 million dollars, right?

A. Yes, sir.

Q. And looking at March 31st of 2009 under the old model there would have been 716 million dollars of Tranche A and Tranche B outstanding, correct?

A. Yes, sir.

Q. And under the new model there's a 837 million dollars of Tranche A and Tranche B, correct?

A. Yes, sir.

Q. For a difference of a 121 million dollars?

A. Yes, sir.

Q. And it's true, is it not, that under the forecast that reflects the revised accommodation agreement, more available cash of the debtors is used for purposes other than paying down the DIP facility?

A. Yes, sir.

Q. And it's true, is it not, that the ending cash -- the ending cash on hand is projected to be the same -- or approximately the same, under, both the old model accommodation agreement and the new model accommodation agreement, that's a true statement, is it not?

A. Yes, sir.

Q. And do you know offhand what the ending cash is projected to be at March 31st under the new model?

A. It's approximately twenty-five million dollars, in that vicinity.

Q. As of March 31st?

A. Yes, sir.

Q. Okay. There are other provisions -- in addition to not paying down the DIP loan as quickly as it would have been paid

down, there are other provisions of the accommodation agreement that the Tranche C lenders have objected to that have not been changed in the revised agreement, correct?

A. Yes, sir.

Q. And that would include the provisions of the agreement that relate to the priming of certain presently unsecured hedging obligations of Delphi, right?

MR. BUTLER: Objection, requires a legal conclusion.

A. Well --

MR. WERDER: I'll withdraw the "presently unsecured."

Q. It includes the provision that put 200 million dollars of hedging obligations on a pari passu basis with the Tranche A DIP tranche, correct?

A. Yes, sir.

Q. That provision hasn't been changed from the prior agreement, has it?

A. No, sir.

Q. All right. Let me just ask you a few questions about the vote. Your supplemental declaration speaks to the voting on the accommodation agreement, does it not?

A. Yes, sir.

Q. And as of the time that your deposition was taken on the 23rd of November, the debtors didn't have a two-thirds vote in favor of the accommodation agreement, did they?

A. I don't believe they did, no.

Q. Okay. And it was, in fact, approximately sixty-three percent, was it not?

A. That's my understanding.

Q. All right. And your new declaration I believe indicates that the percentage is 68.2 percent, it sounds like it might have crept up slightly to 68.37 percent this morning, is that correct?

A. I'm not aware of that fact, but it may have.

Q. Okay. In any event, the percentage that is presently reflected in the vote, is approximately sixty-eight percent, correct?

A. Yes, sir.

Q. And that includes approximately 77.5 percent of Tranche A?

A. I think that's correct.

Q. If you could look at paragraph 14 of your declaration?

A. Right.

Q. It's approximately 77.5 percent of Tranche A, correct?

A. Yes, sir.

Q. And slightly less than half of Tranche B, 47.8 percent, correct?

A. Yes, sir.

Q. And 24.3 percent of the Tranche C, right?

A. Yes, sir.

Q. The Tranche C tranche has overwhelmingly rejected the accommodation agreement, has it not?

A. 75.7 percent did not vote in favor it, that's correct.
Q. Now --
A. Did not submit signature pages, excuse me.
Q. Okay. And focusing on the 68.2 percent, do you have at your disposal the -- either the percentage of that or the dollar value of that that was provided by parties -- by lending parties that were also hedging counterparties or affiliates of hedging counterparties?
A. I don't have that exactly.
Q. You could approximate it, if you could?
A. I believe it's approximately thirty-five percent, in that ballpark.
Q. Approximately thirty-five percent of the vote in favor of the accommodation agreement was provided by parties who are also either hedging counterparties, who are benefiting from the security that they're getting, or have affiliates who are such hedging counterparties, correct?
A. That is my understanding.
Q. Okay. Do you have at your disposal the approximate percentage or dollar value of the 68.2 percent that was provided by parties that got some enhanced fee agreements with the debtors beyond the two percent that lenders would get for voting in favor of the agreement?
A. I do not.
Q. Okay. The new agreement was posted on the Interlinks at

approximately 4 o'clock on the Wednesday before Thanksgiving, correct?

A. The new account -- the accommodation agreement that's before the Court?

Q. That's correct.

A. Yes, sir.

Q. And there was a reference to a 9 o'clock this morning deadline for reaffirmations of prior votes, and you heard that referenced, correct?

A. Yes, sir.

Q. There also was a 5 o'clock p.m. deadline on Wednesday for new votes in favor of the accommodation agreement, was there not?

A. Yes, sir.

Q. Was that deadline extended at all?

A. That deadline was extended to Monday morning, today, at 9 o'clock.

Q. For new votes to come in?

A. Yes, sir. Reaffirmation of votes. Both reaffirmation of existing votes as well as new votes.

Q. Okay. Well, you got some new votes between the weekend of the 22nd and 23rd and today, correct?

A. Yes, sir.

Q. When did those new votes come in, do you know?

A. I believe that some of the came in prior to Wednesday

evening. And some of them came in over the course of the period since Wednesday to today.

Q. Okay. I don't want you to identify them at this point, but are you aware of who the additional lenders are that voted in favor of the accommodation agreement, between Wednesday -- between the time that the hearing was extended last Monday and today?

A. No, I'm not.

Q. And did you have any discussions concerning voting with lenders between the time that the hearing was extended last Monday and the 4 o'clock time Wednesday that the new agreement was posted?

A. I'm sorry, can you clarify the question? Did I have any conversations with them about voting?

Q. Did you have discussions with lenders who were still deciding how they wanted to vote between last Monday and 4 o'clock on Wednesday afternoon when the new -- when the amended agreement was posted?

A. The only lenders that I spoke to between Monday and Wednesday, I only spoke with the administrative agent and one other lender.

Q. And who was that lender?

A. Sorry, two other lenders.

Q. Who were those lenders?

A. I spoke with the administrative agent and I spoke with GE

Capital, and I spoke with another lender by the name of PSAM, P-S-A-M.

Q. Okay. And I wanted to ask you about PSAM. If you refer to paragraph 17 of your supplemental declaration, there's a reference there to a lender with approximately 21.7 -- I think 21.7 million dollars of loans?

A. Yes, sir.

Q. Is that referring to PSAM?

A. Yes, sir.

Q. Okay. And we discussed PSAM in your deposition on November 23rd, did we not?

A. Yes, we did.

Q. And I think you told us in your deposition on November 23rd that PSAM had submitted a vote, but that that vote had not been counted, correct?

A. That is correct.

Q. Has that situation changed since November 23rd?

A. I do not believe that it has.

Q. It has not changed?

A. The vote has not changed -- situation has not changed.

Q. And the 68.2 percent of the vote voting in favor of the accommodation agreement does that include PSAM's vote or does it not include PSAM's vote?

A. My understanding would be that it does not.

Q. Okay. Despite the fact that PSAM did not provide a vote

in favor of the accommodation agreement, the debtors have agreed to -- apparently agreed to pay them some fee, is that correct?

A. Yes, sir.

Q. And can you explain why it is that if PSAM is not providing a vote in favor of the agreement, the debtors are providing them with a fee?

A. We're providing PSAM with an arranger fee as they were supportive of us -- supported us in conjunction with getting the accommodation agreement approved by supporting the agreement in discussions with other lenders.

Q. And you called that an arranger fee?

A. Yes, sir.

Q. Okay. And what did you do to determine what discussions PSAM had with other lenders in support of the accommodation agreement?

A. I discussed with PSAM and with GE Capital the positions that PSAM would be taking in conjunction with the discussions within the group that GE Capital was representing.

Q. And did you determine whether PSAM's activities had had any affect on any party's vote?

A. It is my understanding that it did.

Q. Okay. You're familiar with the terms of the accommodation agreement, are you not?

A. Yes, sir.

Q. And, in fact, you were intimately involved in negotiating that agreement, weren't you?

A. I was very involved, yes.

Q. All right. I'm not asking you this question as a lawyer, but from your perspective, as chief financial officer and negotiator, did you negotiate a provision in the accommodation agreement that would prevent a lender who doesn't vote in favor of the agreement from exercising whatever rights it might have at law, following the maturity date of the DIP facility?

MR. BUTLER: Objection, that sounds like a legal argument to me, Your Honor, even though he says it's not.

THE COURT: Do you understand the question?

THE WITNESS: Your Honor, there's been significant discussion among the lawyers on this subject over the last twenty-four hours. And there is a provision --

THE COURT: I'm just asking you do you understand the question?

THE WITNESS: Not entirely. You know, I'm not sure that I'm the right person to be addressing the subject.

MR. WERDER: I'll withdraw the question.

Q. The DIP agreement provides for a maturity date, does it not?

A. The DIP agreement has a maturity date, yes, sir.

Q. And that maturity date was negotiated between the parties that are signatories to the DIP agreement, was it not?

A. Yes, sir.
Q. And you would agree with me that in a matter of ordinary course, lenders generally expect that they're going to be repaid on their maturity date?
A. Yes, sir.
Q. All right. And the maturity date is an important part of -- it's an important term of the DIP agreement, is it not?
A. Yes, sir.
Q. And currently the maturity date is December 31st of 2008, correct?
A. Yes, sir.
Q. That's the result of a couple of a prior extensions of the maturity date under the DIP agreement, correct?
A. Yes, sir.
Q. And, in fact, there were two prior extensions of the maturity date, weren't there?
A. At least two.
Q. Okay. And those extensions were all negotiated extensions, were they not?
A. Yes, sir.
Q. And your declaration uses the phrase “liquidity runway,” and we discussed that phrase in your deposition. But you would agree with me, would you not, that the length of the liquidity runway provided by the DIP facility was a key negotiating term for the various amendments to the DIP facility, correct?

A. Yes, sir.
Q. And that the prior extensions of the maturity date under the DIP facility were done with the unanimous consent of all of the lenders, correct?
A. Yes, sir.
Q. And you're familiar with Section 10.09 of the DIP facility, are you not?
A. I don't know that I know exactly what that provision says.
Q. Okay. Let me ask that you have exhibit 3 in front of you.
(Pause)
Q. Actually, I'm not sure we even need the provision. You're aware that there's a provision of the DIP agreement that requires unanimous consent for an extension of the maturity date, correct?
A. Yes, sir.
Q. Without regard to what that provision is, you know that that is a provision of the agreement?
A. Yes, sir. I just didn't know it was 10.09.
Q. We may come back to Section 10.09. In connection with the accommodation agreement, it's true, is it not, that sometime around October -- maybe a little earlier than October of 2008, the debtors concluded that they were going to be unable to exit Chapter 11 by the maturity date?
A. Yes, sir.
Q. And they also concluded, did they not, that they would

require continued access to proceeds of the DIP facility beyond the December 31, 2008 maturity date?
A. Yes, sir.
Q. And that's because the debtors are presently unable to secure new commitments to lend them money, correct?
A. Yes, sir.
Q. There may be other reasons as well, but one of the reasons that the debtors require continued access to the proceeds of the DIP facility beyond the maturity date, is that there aren't any lenders out there willing to extend new credit at this point in time, correct?
A. That is unfortunately correct.
Q. And I think your declaration says that that's the reason why the debtors sought what you called a transparent liquidity runway beyond the maturity date, correct?
A. Yes, sir.
Q. And, in fact, what the debtors are seeking is a transparent liquidity runway through June 30th of 2009, right?
A. That is correct.
Q. And, initially, the debtors sought that transparent liquidity runway through a formal extension of the maturity date under the DIP facility, didn't they?
A. Yes, sir.
Q. And there was a -- the debtors went out seeking lender agreement to an extension of the maturity date through June

30th of 2009, correct?

A. Yes, sir.

Q. And based upon JPMorgan's advice the debtors concluded that they weren't going to be able to get unanimous consent for that extension, did they not?

A. Yes, sir.

Q. And it was at that point in time that the debtors revised their strategy and decided to seek the accommodation agreement, right?

A. That is correct.

Q. The effect of the accommodation agreement is to permit the debtors to keep using DIP proceeds after the maturity date, isn't it?

A. That is an effect, yes.

Q. And that's the goal of the accommodation agreement, is it not?

A. The goal is to provide stability of the business while we seek to resolve Delphi's Chapter 11 process. Therefore, it is to preserve liquidity past December 31st.

Q. And the way that the accommodation agreement seeks to implement that goal is to permit the debtors -- purportedly permit the debtors to continue using the DIP proceeds after December 31st despite the occurrence of the maturity date, correct?

A. Yes, sir.

Q. All right. And the -- you participated in a November 17th presentation to lenders concerning the accommodation agreement, did you not?

A. Yes, sir.

Q. And one of the points that was made in that presentation was that the economic terms of the accommodation agreement are consistent with the previous -- were consistent with the previous extension request, right?

A. That is correct.

Q. And that was a true statement, wasn't it?

A. Yes, sir.

Q. All right. Let me address your attention -- or let me get in front of you Exhibit 1, which is your original declaration.

(Pause)

Q. That's the declaration that you originally submitted in support of the accommodation agreement, is it not?

A. Yes, sir.

Q. I direct your attention to paragraph 16.

(Pause)

Q. Are you with me?

A. Paragraph 16.

Q. Paragraph 16, right. So paragraph 16 says "moreover the debtors intentionally limited the number of participants from which the debtors required consents in certain circumstances in order to minimize what you call holdup risk inherent in

unanimous voting provisions in a widely syndicated facility involving hundreds of institutions," correct?

A. Yes, sir.

Q. And then you go on to say "in the exercise of our collective business judgment, I and other members of Delphi management, negotiated certain provisions in the credit agreement to provide the debtors with greater flexibility in their ability to negotiate, if and as necessary, potential amendments to the DIP facility, including the debtors' ability to maintain and preserve liquidity in the event of aggravated disruptions in the credit markets," correct?

A. Yes, sir.

Q. And that was the point that you were making in support of the accommodation agreement, right?

A. Yes, sir.

Q. And it's true, is it not, that the debtors did not negotiate the ability to get amendments to the DIP facility to extend the maturity date without unanimous consent of all of the lenders?

A. I'm sorry, ask your question again, please? I'm sorry.

Q. Yeah. The debtors did not negotiate the ability to amend the DIP facility to extend the final maturity date without unanimous consent?

A. We can only extend the maturity date with unanimous consent.

Q. Okay. And so when the -- when this paragraph 16 refers to what you negotiated to provide you with flexibility the flexibility that was provided did not include the ability to amend the agreement to extend final maturity with less than all of the lenders voting in favor, did it?

A. No. An extension required 100 percent request.

Q. And that's true despite what you say in paragraph 16, correct?

A. I think that paragraph 16 is referring to a situation where we are not extending but rather dealing with the forbearance or accommodation situation.

Q. All right. I want to direct your attention to Exhibit 8. If you can get Exhibit 8 in front of you? This is the JPMorgan fee letter that relates to the fees that JPMorgan has the potential to earn in connection with the accommodation agreement, correct?

A. Yes, sir.

Q. And if you look at page 3 of the letter the fee structure provides for a DIP modification arrangement fee and a separate extension fee, does it not?

A. That is correct.

Q. And the separate extension fee is a fee that is earned in the event that there is an agreement that extends the maturity date of the DIP to June 30th of 2009, correct?

A. Yes, sir.

Q. And we discussed that provision of the agreement in your deposition, didn't we?

A. We did.

Q. And your testimony at the deposition was that the second fee -- that both of those fees would be paid upon the approval of the accommodation agreement, correct?

A. That was my testimony. And I subsequently determined that that answer is probably not correct.

Q. Well, your -- let's just talk about what your testimony -- what your understanding was on November 23rd at your deposition.

MR. WERDER: May I approach the witness, Your Honor, to hand him a copy of the transcript?

THE COURT: Yes, that's fine. This is in the exhibit book?

MR. WERDER: It's not an exhibit, Your Honor. I'll hand up a copy for the Court.

MR. BUTLER: I don't know what the purpose of it is, he just agreed to what the testimony was. He said he determined subsequently it was incorrect, what are you trying to impeach him?

THE COURT: I thought you were going to something else.

MR. WERDER: No, I'm going to continue on this, Your Honor. I'll ask it without the deposition.

Q. Your understanding as of November 23rd was that the -- that both of the fees would be paid to JPMorgan upon the approval of the accommodation agreement, correct?

A. You're correct that that's what I told you at the deposition.

Q. Okay.

A. But I also want to make sure that I'm clear with you that upon further discussions that isn't true.

Q. And when did those further discussions occur?

A. After the deposition.

Q. How soon after the deposition?

A. Last week.

Q. And when did you first bring to our attention that your understanding was incorrect?

A. I'm not aware whether anybody brought it to your attention. I apologize about that.

Q. Are you aware of anytime, prior to your declaration being submitted yesterday, when that mistake, which you say now was a mistake, was brought to your attention -- was brought to our attention I should say?

A. I'm not aware.

Q. Okay. Let me direct you back to Exhibit 3, if I could.

(Pause)

Q. And I said we might return to Section 10.09 of the agreement. That is, in fact, the section that I want to direct

your attention to.

(Pause)

Q. Are you with me?

A. Yes, sir.

Q. Now, in addition to negotiating the accommodation agreement you were involved in the negotiation of this DIP agreement, were you not?

A. The DIP agreement?

Q. Yes.

A. Sorry, I thought you said stip, yeah.

Q. The credit agreement?

A. Yes, sir.

Q. The one that was executed in May of 2008, right?

A. Yes, sir.

Q. You participated in the negotiations over that agreement, correct?

A. Yes, sir.

Q. From the business perspective of Delphi were you the chief business person who was involved in negotiating that agreement?

A. I was one of the persons, yes.

Q. All right. Do you recall whether or not Section 10.09 of the agreement was discussed across the bargaining table in any negotiations that you participated in?

A. I don't recall any negotiations over that.

Q. Okay. Section 10.09 deals with modifications, amendments

or waivers, does it not?

A. Entitled amendments, etcetera.

Q. Okay. And the first lien of it says -- talks about no modification, amendment or waiver and then it goes on, correct?

A. Yes, sir.

Q. And we referred earlier to the provision of the agreement that would require unanimous consent for an extension of the maturity date, this is, in fact, the provision that does that, is it not?

MR. BUTLER: Objection, Your Honor. The documents speaks for itself.

THE COURT: You just want to lay a foundation for your next question?

MR. WERDER: That's just a predicate for the next question.

THE COURT: All right. So we can move on then. Sustained.

MR. WERDER: Okay.

Q. In the discussions that you had with lenders concerning the accommodation agreement, was the accommodation agreement characterized as an amendment of the DIP facility?

A. The accommodation agreement represents an agreement whereby the participating lenders are agreeing that the -- to the terms of the accommodation agreement. Including that the administrative agent will not exercise remedies.

Q. And the agreement has a provision, that I think we discussed in your deposition, under which the proceeds of the DIP facility are due on maturity, correct?

A. Yes, sir.

Q. And they're due on maturity automatically without any other application to or action by the Court, correct?

A. Yes, sir.

Q. Okay. And the affect of the accommodation agreement is to waive that provision, is it not?

MR. BUTLER: Objection, that's a legal conclusion.

THE COURT: Sustained.

Q. Well, did you have any discussions in your negotiations of the accommodation agreement concerning whether or not the effect of the accommodation agreement was to waive that provision of the DIP facility?

MR. BUTLER: Objection, Your Honor. The document speaks for itself. We'll be dealing with this in legal argument.

MR. WERDER: The question is whether it was negotiated.

THE COURT: What was negotiated?

MR. WERDER: Whether the use of the word “waiver” was part of the discussions that he had with other parties concerning the accommodation agreement. I'll withdraw the question.

Q. In discussing the accommodation agreement with parties outside of Delphi was there any discussion about whether or not the accommodation agreement affected a waiver of that automatic payment provision of the DIP facility?

MR. BUTLER: Objection, document speaks for itself. It does whatever it does, we'll be able to argue what that is. I don't know --

THE COURT: Are you arguing that the document is somehow ambiguous?

MR. WERDER: Well, Your Honor their argument is that the -- that somehow the accommodation agreement evades a provision of the credit agreement. And what I'm trying to determine is whether there was any discussion that occurred in the course of negotiating the accommodation agreement.

THE COURT: Unless there's a dispute that's relevant as to whether the agreements ambiguous, the agreement speaks for itself. I'm not supposed to look beyond the four corners of the agreement.

MR. WERDER: Okay. I'll move on then.

THE COURT: Okay.

Q. Let me direct your attention to your declaration which is Exhibit 1, if you can get that in front of you?

(Pause)

A. Yes, sir.

Q. I want to direct your attention, if I could, to paragraph

21.

(Pause)

Q. Paragraph 21.

A. Okay.

Q. And in paragraph 21 you say, among other things, that the accommodation -- you describe the accommodation agreement as implementing the terms of the credit agreement, is that correct?

(Pause)

Q. I'm looking at the bottom of page 13 -- the bottom of page 12, the top of page 13.

A. Yes, sir.

Q. And in terms of implementing the terms of the credit agreement, what provision of the credit agreement is it that you assert is being implemented by the accommodation agreement?

A. It is a provision, as I understand it. I cannot tell you the exact reference in the credit agreement that permits the required lenders, meaning the A and the B lenders, by a majority vote to direct the administrative agent not to exercise remedies.

Q. And I think we established in your deposition that that was paragraph or Section 7.01 of the DIP facility, correct?

A. I believe that's correct.

Q. That's the provision that you're referring to when you assert that the accommodation agreement implements the terms of

the DIP agreement, right?

A. Yes, sir.

Q. Okay. And paragraph 7.01 -- in negotiating the DIP agreement, it's true, is it not, that you didn't participate in any meetings where that provision was discussed with either the agent or the lenders?

A. I did not personally, no.

Q. And you did not participate in any calls with the agent or the lenders where that provision was discussed, correct?

A. I did not personally.

Q. And you didn't exchange any correspondence where the interpretation of that provision that's set forth in the debtors' motion papers was put forth, did you?

A. I did not personally, no.

Q. In fact, you don't recall any negotiations at all concerning Section 7.01 of the agreement, right?

A. I do not.

Q. And it's true, is it not, that in the course of the negotiations over the DIP agreement you never advised the lenders that the debtors were seeking to give themselves the ability to continue using the DIP proceeds beyond the maturity date?

A. I didn't read -- in my deposition I indicated that I didn't recall any discussions.

Q. Okay. And the first time that you heard of any

interpretation of the DIP facility that permitted the lenders -- that could be asserted to permit the lenders to continue using the DIP facility proceeds beyond the maturity date was in October of 2008, is that correct?

A. I don't believe that I had a reason to be discussing the subject before then.

Q. And, in fact, the first time that you heard that the debtors could claim to have a right to continue using DIP facilities beyond -- proceeds beyond the maturity date was in October of 2008, wasn't it?

A. That's the first time that I had reason to discuss the subject.

Q. And the first draft of the accommodation agreement was prepared by JPMorgan, was it not?

A. I believe that's what I testified in my deposition about.

Q. And the accommodation agreement has various provisions that deal with the hedging collateral basket, doesn't it?

A. Yes, sir.

Q. And those provisions were first proposed by JPMorgan, weren't they?

A. I believe that's the case.

Q. And JPMorgan, in addition to being the administrative agent is the largest counterparty on hedging transactions that the debtor has, correct?

A. I believe so.

Q. And among other things, the provisions that deal with the hedging collateral basket allow -- provide a benefit to those hedging counterparties by increasing the security that they have, correct?

A. Yes, sir.

Q. And, in fact, the accommodation agreement gives the hedging counterparties 200 million dollars as additional security that's pari passu with Tranche A of the DIP facility, right?

A. Tranche A and Tranche B, yes.

Q. And it puts an additional 200 million dollars ahead of Tranche C, does it not?

A. Yes, sir.

Q. Now, I think that -- we talked about this provision in your deposition and your explanation for this is that you wanted these hedging provisions in the accommodation agreement because of something having to do with cross defaults, possible cross defaults, is that correct?

A. Yes, sir.

Q. Can you explain that, please?

A. Delphi has entered into foreign currency and commodity contracts which have a provision in them. Those contracts have a provision in them that if we were in default on the DIP would permit the counterparty to terminate the contracts. As a result of current dislocation that's taking place in the

capital markets those contracts are currently in a loss position. And those contracts hedge -- they hedge operational foreign currency and commodity purchases that Delphi would make in the normal course of its business in 2009 and 2010. My concern, as the chief financial officer of the company, is that if those contracts are terminated upon the effectiveness of the accommodation agreement, that we will crystallize an administrative liability to the estate and then the estate would be exposed to subsequent changes in foreign currency and commodity costs which would -- could have the impact of doubling our issue. One, having crystallized the liability and then the market recovers, and when the operational -- underlying operational transaction takes place I have to pay more for the foreign currency or for the commodities.

Q. And just to break that down a little bit, am I understanding you correctly that your concern relates -- your stated concern relates to the fact that accommodation agreement leaves a -- what I think you previously described as a technical breach of the DIP agreement in place?

A. The accommodation agreement results in a breach of -- a default under the DIP, right?

Q. And was it then your concern, as you're stating it now, that default under the DIP agreement could cross default these hedging agreements?

A. Yes, sir.

Q. Okay. And that's, in fact, what you claimed to be your principal reason for wanting the hedging provisions in the accommodation agreement, correct?

A. Yes, sir.

Q. Prior to proposing the accommodation agreement, the debtors proposed an amendment to the DIP agreement, did they not?

A. I'm sorry, ask your question again, please?

A. Before you adopted your new strategy and sought the accommodation agreement, you first sought an amendment to the DIP facility, correct?

A. An extension of the DIP facility.

Q. And the reason for seeking that extension would be to eliminate the potential for a breach upon the December 31, 2008 maturity date, correct?

A. Yes, sir.

Q. If the amendment strategy had been accepted and had won the support of the lenders, then there wouldn't have been even a technical breach of the DIP agreement based upon the December 31st maturity date because that date would have been extended, correct?

A. That is correct.

Q. Okay. And so your stated concern over a technical breach of the DIP facility triggering cross defaults under the hedging agreements wouldn't have existed in an environment where the

debtors were successful in obtaining the amendment to the DIP agreement, correct?

A. That situation would not have existed, that's correct.

Q. Nevertheless, when you proposed the amendment to the DIP facility, you also proposed increasing the hedging collateral basket in connection with that amendment, did you not?

A. Yes, sir.

Q. Okay. And that proposal wasn't motivated, was it, by any concern over cross default?

A. It was not.

Q. All right. Those hedging provisions were included in the accommodation agreement in order to encourage hedging counterparties, who were also lenders, to vote in favor of the accommodation agreement, isn't that true?

A. That would be another reason, yes.

Q. And, in fact, that is, in fact, one of the reasons why the hedging provisions that provides security to 200 million dollars of presently unsecured hedging obligations, were included in the accommodation agreement, correct?

A. It is one reason, yes.

Q. You did that because you wanted to get certain parties, who were both lenders and hedging counterparties, or affiliates of hedging counterparties, to vote in favor of the accommodation agreement, correct?

MR. BUTLER: Objection, answered twice already.

THE COURT: Sustained.

Q. And, in fact, you participated in a call with the -- an all lender call on November 17th of 2008, did you not?

A. I did.

Q. And you were asked in that call whether you were granting the priming liens to the hedging counterparties because you needed to get their votes, weren't you?

A. I don't recall every single conversation, every question in that call. So I think we went through this in my deposition. I may have been asked that question.

Q. Okay. You don't recall that question being asked?

MR. BUTLER: Objection, relevance. The witness has already testified that one of the reasons that Delphi exercised its business judgment was in connection with getting sufficient Tranche A and B votes. I don't know what the relevance is to the rest of this line of questioning.

THE COURT: Well, I'm assuming you're leading up to another question? This is a foundation also?

MR. WERDER: I think I can withdraw that question, Your Honor.

THE COURT: Okay.

MR. WERDER: Give me one moment, please.

THE COURT: Okay.

BY MR. WERDER:

Q. We talked a few minutes ago about Exhibit 8 which was the

JPMorgan fee letter. Delphi has also entered into fee agreements with various other Tranche A lenders, has it not?

A. Yes, sir.

Q. Let me ask you if you could get in front of you Exhibit 105.

A. 105?

Q. You have Exhibit 105?

A. Yes, sir.

Q. That's the fee agreement that Delphi entered into with GE on November 20th, correct?

A. Yes, sir.

Q. Has this agreement been modified in any way since November 20th?

A. Not to the best of my knowledge.

Q. Okay. And it provides for a two million dollar arrangement --

MR. BUTLER: Objection. You're reading from a confidential document, counsel.

MR. WERDER: I thought we established that the fee numbers were fair game?

MR. KIRPALANI: I think they --

MR. BUTLER: I don't think they've been disclosed --

MR. KIRPALANI: I think they gave them the aggregate.

MR. WERDER: Oh, okay.

MR. BUTLER: I don't think they've been disclosed

publicly at all actually --

MR. KIRPALANI: No. I think --

MR. BUTLER: -- other than the aggregate amounts. The --

MR. WERDER: Withdrawn.

MR. BUTLER: Your Honor, can we have just one moment, please?

MR. WERDER: I won't use the numbers.

THE COURT: Okay.

BY MR. WERDER:

Q. The agreement provides provide for an arrangement fee to be paid to GE, does it not?

A. Yes, sir.

Q. And if I can direct your attention to the top of --

MR. WERDER: I apologize for that, Mr. Butler. I thought we had an agreement on that.

Q. If I could direct your attention to the top of page 2, it states that "it shall be a condition to the effectiveness of GE signature page to the accommodation agreement that (i) GE Capital shall have received the arrangement fee" and then it goes on, correct?

A. Yes, sir.

Q. And it is, in fact, the condition to the effectiveness that GE's vote in favor of the accommodation agreement that they be paid the arrangement fee set forth in Exhibit 105,

correct?

A. Yes, sir.

Q. All right. Direct your attention to Exhibit 103.

MR. BUTLER: Your Honor, can we have just one moment?

THE COURT: Okay.

(Pause)

Q. Without regard to the specifics of this agreement, there were various fees beyond the two percent fee that the debtors agreed to pay to various parties in connection with the discussions seeking their approval of the accommodation agreement, correct?

A. There were other fees that we agreed to pay, yes.

Q. And those fees were paid in order to encourage or induce those parties to vote in favor of the agreement, correct?

A. That is one reason.

Q. Okay.

MR. WERDER: No further questions, Your Honor.

THE COURT: Okay. Does anyone else want to cross examine Mr. Sheehan?

CROSS EXAMINATION

BY MR. NEIER:

Q. I guess good afternoon, Mr. Sheehan. David Neier, on behalf of certain A and B lenders. Very briefly, Mr. Sheehan, as of November 23, 2008, you estimated that the hedging exposure for Delphi was approximately 400 million dollars, do

you recall saying that?
A. I do.
Q. And can you tell me, has that amount changed since November 23 now that we're at the end of the month?
A. Yes, sir.
Q. And what is approximately the exposure as of today?
A. It's a little bit less than 350 million dollars.
Q. 350 million? And when we say "exposure", it's not as if there's a claim today, correct, for that amount?
A. No. There is not a claim today, that's --
Q. It would only be if the swap were terminated, is that right?
A. That's correct but they're not all swaps.
Q. If the hedging obligations were terminated --
A. I apologize.
Q. -- is that right?
A. That is correct.
Q. And what happens under the accommodation agreement if this hedging obligation amount were to exceed 500 million dollars?
A. The counterparties would have the right to terminate.
Q. And then you would have your double issues, is that right? You would have both a terminated hedging obligation or potentially a terminated hedging obligation and you would have the obligation, correct?
A. Yes, sir.

Q. And so, you would have the issue you just spoke about as being very damaging to the company if, at any time, the exposure under the accommodation agreement between now and June 30th, 2009 were to exceed 500 million dollars, correct?

A. That is correct.

Q. And I think you may have covered this with Mr. Werder, so I'll be very brief. And I think you may have also covered it in your declaration. Would you say that there is some turmoil and uncertainty in the automotive industry at this stage?

A. Some --

Q. Turmoil and uncertainty in the --

A. -- turmoil. Sorry. I didn't --

Q. -- automotive industry at this stage?

A. It is an uncertain time in the U.S. economy as a whole and obviously, the automotive industry is -- it's well publicized the challenges it's currently going through.

Q. And a lot of things can happen between now and June 2009, is that right?

A. Positive and negative, yes.

Q. The government could provide support to GM and other OEMs, is that correct?

A. They could.

Q. The government could also decide not to support those companies?

A. I hope not.

Q. And there could be a bankruptcy of one of the OEMs, is that possible, between now and June 2009?

A. I would also hope not.

Q. But it's possible?

A. It's possible.

MR. NEIER: No further questions, Your Honor.

THE COURT: Okay. Anyone else want to cross examine Mr. Sheehan? Okay. Do you have any redirect?

MR. BUTLER: Your Honor, I may. Could we take a five minute recess before that?

THE COURT: Sure, that's fine.

MR. BUTLER: Thank you.

(Recess from 12:17 p.m. until 12:25 p.m.)

THE COURT: Please be seated. Okay. We're back on the record in Delphi and, Mr. Sheehan, you're still under oath.

THE WITNESS: Yes, sir.

MR. BUTLER: Your Honor, the debtors have no redirect.

THE COURT: All right. I had a couple of questions, Mr. Sheehan. First, are there any separate notes in connection with the DIP or is it just the DIP agreement and the DIP order?

THE WITNESS: I'm not aware of any separate notes, Your Honor.

THE COURT: Okay.

THE WITNESS: But -- I'm not aware of any separate

notes.

THE COURT: Okay. There are none in the exhibit books, right?

MR. KIRPALANI: I believe they're permitted under the credit agreement. I'm not sure if any have been issued.

THE COURT: I know that. But I have not seen any in the exhibit books. Okay. You mentioned the arrangement fee that was agreed to be paid to PSAM -- or, is that how you pronounce it? PSAM?

THE WITNESS: PSAM --

THE COURT: Okay.

THE WITNESS: -- is how I understand they pronounce it.

THE COURT: And then there was some testimony about arrangement fees or other fees in addition to the two percent upfront before certain other parties -- and you testified as to the agent having a fee and GE having a fee. Leave aside the agent, what was it that, in the debtors' mind, merited an arrangement fee for GE?

THE WITNESS: What -- they provided us substantive input associated with the accommodation agreement. They also then organized a set -- a group of lenders who voted in accord -- who submitted signature pages to the accommodation agreement. And it was that support by relaying the company's messages to those lenders and getting the signature pages in.

THE COURT: Had they syndicated a portion of the loan or what was their connection to this group or was it just based on their own expertise that they had a connection to this group?

THE WITNESS: It was their own -- I'm not aware of any syndication to this group, Your Honor. They organized a group of lenders who they -- I'll use the word represented to us and brought along as part of the negotiations.

THE COURT: And there are other parties that you discuss not by name but --

THE WITNESS: Yes, sir.

THE COURT: -- generically in your declaration and they're referenced in fee letters in the exhibits.

THE WITNESS: Yes, sir.

THE COURT: Did they provide the same type of benefit to the debtor that you just described GE provided?

THE WITNESS: Yes, generally, although the other parties that are referenced in the -- in my declaration or supplemental declaration represent, in addition to providing the support to the company, also provide us with advice and -- with respect to the market, the ability to get transactions done not -- this transaction done, the terms of the transaction, etcetera. I'm not -- they were not organizing groups the same way that GE Capital was.

THE COURT: So what did they do then? They advised

you on the terms of the accommodation agreement and what might --

THE WITNESS: Be acceptable, not acceptable, what -- what -- what they were hearing in the marketplace with respect to the transaction, etcetera.

THE COURT: Okay.

(Pause)

THE COURT: Okay. I have no further questions. Unless either side has a question on what I've just asked.

MR. BUTLER: I do, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q. Mr. Sheehan, just so the record's clear here, has Delphi paid similar arrangement fees to lenders at other points in this Chapter 11 case?

A. Yes, sir.

Q. When were those arrangement fees paid?

A. In conjunction with the previous extensions of the DIP facility.

Q. How about the original DIP facility? Were there arrangements fees paid in connection with that?

A. Yes, sir.

Q. So, in fact, Mr. Sheehan, there have been arrangement fees paid in each of these DIP transactions, is that correct?

A. Yes, sir.

MR. BUTLER: No further questions.

THE COURT: Okay. All right. You can step down, sir. Okay. Do the debtors have any additional evidence?

MR. BUTLER: Your Honor, we don't. We'll rely on Mr. Sheehan's testimony and on all the exhibits that have been admitted.

THE COURT: Okay. Mr. Kirpalani, did you want to call your witnesses in light of that --

MR. KIRPALANI: No. I think the point is sufficiently made, Your Honor.

THE COURT: Okay. So I take it, given that these are joint exhibit books, that there's no additional evidence? All right. So I'll hear brief oral argument from the parties. I guess I -- well, I guess I should probably hear from the objectors first since I have a pretty good idea of the debtors' argument.

MR. KIRPALANI: Thank you, Your Honor. Your Honor, may I approach? I have some demonstrative slides I'd like to give the Court so I can walk you through some points?

THE COURT: That's fine. Do you have copies for --

MR. KIRPALANI: Oh, sure. All of these were previously shared with debtors' counsel as well, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: Your Honor, for the record, Susheel

Kirpalani of Quinn Emmanuel Urquhart Oliver & Hedges, counsel for the consortium of DIP lenders, known as the Tranche C Collective. Your Honor, members of the Tranche C Collective hold over a billion dollars of the Tranche C DIP loans as well as Tranche A and B loans under Delphi's DIP facility. Your Honor may recall that Delphi's DIP has three distinct tranches. Tranche A is the revolver of up to 1.1 billion dollars of which less than half is drawn. Tranche B is the 500 million dollar term loan and Tranche C is by far the largest. It's a 2.75 billion dollar term loan.

Your Honor, the debtors' motion to approve the accommodation agreement is not at all as advertised. From the opening motion to the reply papers to the new and improved revised accommodation agreement from over the long weekend, the debtors have done everything possible to avoid saying what they are really doing to the DIP facility, namely, extending the maturity, which they have done twice before properly with unanimous consent but were unable to do this time.

Your Honor, despite the debtors' mantra that they are seeking forbearance, they are seeking an extension of the maturity date through the back door and you really need, Your Honor, to parse the text of the accommodation agreement but it is there.

First, Section 2(a) of the accommodation agreement says "the participant lenders are directing the agent not to

exercise remedies provided for in the credit agreement and the security agreement." That's clear as far as it goes. Section 2(a) also says that "participant lenders are themselves each agreeing", and they can't bind any other lenders in making that agreement, but for themselves "not to make any demand for repayment or seek other remedies under the credit agreement or under applicable law". But this distinction is very important because the credit agreement does not require any collective action by the required lenders or the agent to require payment of the DIP loans at maturity. It is, by definition and under the letter of the credit agreement, automatic.

Your Honor, the language of Section 2.28 of the credit agreement could not be more clear. If you just take a look at the first slide, we blew up Section 2.28, Your Honor. It says very clearly that, "Upon the maturity, the lenders shall be entitled to immediate payment of such obligations without further application to or order of the bankruptcy court." Mr. Sheehan acknowledged as much.

What the debtors say is the intent of this forbearance, the full amount of the DIP obligations, whatever the debtors' say is the intent of the forbearance, Your Honor, the full amount of the DIP obligations are automatically due and payable as superpriority administrative expense claims on December 31st, 2008. That's an absolute obligation and we do not even have to make a demand. And as the Court well knows,

and as Mr. Sheehan testified, the maturity date of the DIP facility cannot be extended without unanimous consent.

If Your Honor would take a look at Section 10.09, which is the next slide, it's quite clear where it says "No modification, amendment or waiver of any provision of this agreement shall be effective unless signed by the required lenders provided, however, that no such modification or amendment shall without the written consent of the lender affected thereby" -- and that's important because under Section 2.01 of the credit agreement, each lender severally agreed to make loans, not jointly. They cannot without each "lender affected thereby extend the final maturity of the borrower's obligations hereunder."

So, Your Honor, having tried and failed to get a third unanimous extension, the debtors came up with plan B in October. Leave the maturity technically at December 31st, 2008 but just don't pay it. And when the lenders complain, tell them we aren't extending maturity but the required lenders have decided to exercise any remedies, not to foreclose on collateral, etcetera. But exercising remedies under Section 7.01, Your Honor, has nothing to do with the debtors' obligations to pay its superpriority administrative DIP claims upon maturity. We should just take a look at it. Section 7.01 deals with all events of default and its application at final maturity is limited to foreclosure which we aren't trying to do

here today, Your Honor. Section 7.01 says that "the agent may or, at the direction of the required lenders, shall" -- I'm paraphrasing but the first one is "terminate or suspend the total commitment". Your Honor, this is irrelevant at final maturity because payment is due under Section 2.28 regardless and the total commitment automatically terminates under 2.13(c). So, so far 7.01 is irrelevant. "Declare the loans due and payable". Again, that is not needed at final maturity in the face of Section 2.13(c) and 2.28. The debtors are very careful not to try and amend 2.13(c). They added in Section 10 of the accommodation agreement a new 2.13(d). But they had to leave 2.13(c) alone. 2.13(c) says "Upon the maturity date", which is the termination date, "the debtors shall pay."

The third is to cash collateralize unsecured letters of credit. You've got to go through the hoops of the collective action in order to cash collateralize unsecured letters of credit. I don't think that's really in dispute.

The fourth is to set off amounts held by administrative agent for the benefit of all lenders. And the fifth is to exercise other remedies available under applicable law.

THE COURT: It doesn't say that. It says "exercise any and all remedies under the loan documents and under applicable law available to the administrative agent and the lenders."

MR. KIRPALANI: Okay. Yes, Your Honor. It's any and all remedies under the loan documents or under applicable law available to the agent or the lenders. This is what the agent may do or, at the direction of the required lenders, shall do. It doesn't eviscerate the absolute obligation of the debtors upon maturity.

So what is really going on here, Your Honor, is that the motion is seeking an extension of maturity. It is the very same liquidation runway.

THE COURT: What about the introductory clause to 2.28?

MR. KIRPALANI: That says “subject to 7.01?”

THE COURT: Right.

MR. KIRPALANI: Your Honor, the items in 7.01 are not required to make this an absolute payable obligation. 2.13(c) makes that abundantly clear. It says "Upon the termination date" which is the maturity date. It is defined as "the earliest to occur of", and maturity date is early enough, "the debtors shall pay the entirety of the loans".

THE COURT: 7.01 covers defaults where the principal of the loans becomes due and payable, right?

MR. KIRPALANI: That is correct, Your Honor.

THE COURT: Including whether it's based on a fixed date or not.

MR. KIRPALANI: I'm not sure it specifically talks

about it upon maturity.

THE COURT: Well, it says that at the top of page 79.

MR. KIRPALANI: Um-hmm.

THE COURT: "When and as the same shall become due and payable whether at the due date thereof". So I guess I'm having a hard time seeing how 7.01 doesn't govern 2.28.

MR. KIRPALANI: Well, I guess it depends on what it is being requested. If, Your Honor, we were sitting here trying to ask the agent to foreclose, we would have to comply with 7.01. But that's not what we're arguing. We're not here, Your Honor -- and that's what really takes this case outside of some of the other case law that the debtors do rely on including Beal Savings Bank. We are not here trying to take action against the debtors or trying to invoke any kind of collective action. Even if you accept arguendo that that collective action is what is the only remedy available to the lenders, even if you were to accept that, Your Honor, we are not here trying to take action. What we are here, Your Honor, is defending against an action by the debtors who are saying notwithstanding there are numerous provisions in the credit agreement that require payment in full at maturity, nothing is going to happen. That's what they're trying to get Your Honor to do. That is exactly what they're trying to get Your Honor to do. And, Your Honor, that is why they are paying the fees. Otherwise, I would imagine they're not paying the fees just for

the sake of having some sort of a comfort from certain lenders. They are trying to effectively prevent the debtors from being required to pay their obligations at maturity. And that flies directly in the face of the maturity date and Section 2.13(c), Your Honor, which they have not even tried to amend because they know they can't.

Your Honor, all of the prior --

THE COURT: But I don't understand why the Beal Bank case and the other cases that deal with situations where a creditor who doesn't fall within whatever the requisite voting authority is, is held not to have standing to enforce a right or a remedy.

MR. KIRPALANI: Well, I think Beal Bank is a very distinguishable case, Your Honor. First of all, Beal Bank dealt with a bank trying to take action independently to pursue a keep-well agreement because thirty-seven out of the thirty-eight lenders decided not to do that and they wanted to settle instead. That is not what's before the house, Your Honor. It's not before the Court. We're not here seeking to take -- we're not asking for an advisory opinion today on what actions we could take on January 1st. All we are asking Your Honor to do is, as bankruptcy courts always do, look to the substance of what transaction is being brought before the Court. The substance of this transaction is to extend the maturity date to provide Delphi with the exact same transparent liquidity runway

that they negotiated for in the past and obtained with a unanimous consent. There is no substantive difference to what is happening, Your Honor. We would not need to exercise remedies. It is an absolute obligation of the estate on January 1st unless they can get it waived. And they are saying on one side, Your Honor, they're not trying to waive it. But on the other side, they're saying effectively, it will have no meaning.

Your Honor, Section 2.13(c) provides for "mandatory prepayments and automatic commitment terminations upon the termination date. Again, the termination date is expressly defined as the maturity date. That section plainly says what has to happen upon final maturity. And that is exactly what is not going to happen if Your Honor approves the accommodation agreement. The relief the debtor seeks leads to an absurd interpretation of the credit agreement. It cannot be reconciled or squared with Section 2.13(c) which clearly provides no further action is even needed by the lenders as a precondition to the debtors' obligation to pay and that the debtors shall pay.

But perhaps the greatest evidence, Your Honor, of the substance of the accommodation agreement, is Mr. Sheehan's own characterization of requiring the very same liquidity runway he had obtained before through unanimous extensions of the maturity. And during his own testimony at deposition that he

believed, as the chief architect of the accommodation agreement that the success fee to JPMorgan Chase for obtaining an extension was actually due and payable. And I know, Your Honor, that on the stand today, he's changed his answer. But this was not a passing comment, Your Honor. If you'd look at the next slide and see exactly the type of thought that went into his answer, it's right there. The question was "And it also provides for a second fee in addition to that fee if there were an extension of the maturity date to June 30th of 2009, correct?"

"A. Correct.

"Q. Would that fee be earned pursuant to the effectiveness of the accommodation agreement?

"A. Yes, sir."

He had the JPMorgan fee letter right in front of him, Your Honor. The final question: "So if the accommodation agreement is approved then they also earn the fee of blank?"

"A. Yes, because it extends to June."

The accommodation agreement extends to June 30th, 2009. The admission is there, Your Honor. Whether he changes his mind after the deposition and realizes this is damaging to the case, it shouldn't be ignored. But you considered in light of other things, in light of his testimony, that it is the same transparent liquidity runway that he tried to obtain through an extension. It is the same economic terms he tried to obtain

through the extension, Your Honor. Uncoached and unadulterated with the fee letter in front of him, Mr. Sheehan testified as to what the debtors were really trying to accomplish.

Indeed, Your Honor, Section 2(f) of the accommodation agreement goes to great lengths to say even though this looks like a waiver, it walks like a waiver and it quacks like a waiver, the one thing we are not doing is waiving the maturity date.

Your Honor, on the basis of the foregoing, the motion should be denied. And we have heard, and I heard Your Honor's comments about Beal Bank. And if I understand the proposition if lenders agree to collective action mechanics then one lender cannot object and seek action. I'm sure Your Honor studied the case more carefully than I did. Although I agree it has some superficial appeal, the case itself does not discuss what's before the Court today. Beal Savings wanted to sue. There were thirty-six out of thirty-seven lenders saying we don't want to sue. Beal violated that provision and sued anyway. There is no request here by any lender seeking to exercise remedies or do anything that the credit agreement requires collective action to do.

Beal was also, Your Honor -- and this really should not be ignored. It was an historic case where there was a very persuasive dissent. There was a footnote in the majority opinion. The decision came out in 2007 and there's a footnote

in the majority opinion, and I'm sure Your Honor read it, that says "If parties intend to preclude rights" -- and again, that's not before the Court today. Maybe it'll be in January -- "they should say so explicitly." The Court even says -- this is the majority opinion: "For the future, parties should expressly state their intention in this regard". That was to deal with the argument, Your Honor, well, it doesn't actually say that a lender gives up a right. It says that remedies are cumulative. It says that every lender is several. And it says that -- in that case two-thirds -- the required lenders can direct the agent to do certain things.

But this was the court of appeals in 2007 saying "For the future, parties should expressly state their intention in this regard." It was an historic case.

This credit agreement was amended and restated in its entirety in May of 2008. And the same counsel that represented the defendants in Beal Savings Bank represents the debtors here, Your Honor. So they can't say they didn't know about it. If they intended to make this clear, they should have. But while Beal Savings Bank is inapposite, Your Honor, what is squarely before the Court is an attempt by the debtors to do exactly what the four corners of the credit agreement prohibit: extend the maturity. The debtors are looking for a backdoor way to prevent lenders from being paid at maturity without unanimous consent. The parties were very clear in Section

10.09 that the maturity date is sacrosanct.

If Your Honor could just look at Section 10.09, which is the next demonstrative. Again, it's really important to look at how carefully these provisions were drafted. In Romanette ii of the proviso, it talks about you need the lender affected thereby's "consent to (a) increase the commitment of the lender, it being understood that a waiver of an event of default shall not constitute an increase in the commitment of a lender". But then, Your Honor, when it talks about extending the final maturity of the borrower, there is no parenthetical. There's no parenthetical that says it being understood that forbearance of remedies shall not constitute an extension of a maturity. It's not there because it would be absurd to say that, Your Honor. Of course that is what it's doing.

And, Your Honor, if this is not designed to eviscerate, cause a waiver of and eliminate the debtors' obligation to pay upon maturity then I don't know what it is.

Even the language of Section 7.01 of the credit agreement, Your Honor, I would posit does not fit what the debtors are trying to do. What it says is that upon an event of default, the agent may and at the direction of the required lenders, shall exercise remedies. The notion, Your Honor, that the debtors specifically reserved and negotiated for the right to get the required lenders to forbear and thereby avoid paying at final maturity is completely at odds with the more specific

provisions which expressly mention maturity, that's 2.13(c), 2.28 and 10.09.

As the Court in Beal Savings Bank did hold, Your Honor, "the Court should construe agreements to give full meaning and effect to those material provisions". And it's hard to imagine a more material provision than the maturity date in a loan, Your Honor.

The Court should not adopt an interpretation of 7.01 that would render any other portion of the credit agreement meaningless. And essentially, they're asking you to do that when they can't touch Section 2.13(c) but they're trying to touch everything around it. Your Honor, tell me, if the debtors are not urging an interpretation of the credit agreement that renders Section 2.13(c), 2.28 and 10.09 meaningless, what are they doing?

But putting aside, Your Honor, our position that this is a de facto extension of maturity, because it could be nothing else, we are not here, as we've said, trying to exercise remedies.

THE COURT: Well, before we get to that, the provision you're relying on primarily, I think, is 2.13(c) which says that the debtors shall pay. It puts the onus on the debtor to pay. The -- let me just play out what I think your argument is. Assume for the moment hypothetically that I approve the debtors' entry into the accommodation agreement.

And December 31 comes, or January 1st comes, and the debtor doesn't pay, what is the consequence at that point?

MR. KIRPALANI: I think, Your Honor, I think there's a variety of things that lenders do have the right to do. The first, they have the right to again come before the Court and seek adequate protection. That's not waived in the credit agreement. We've seen plenty of second lien deals, Your Honor, where it is waived. This is not one.

THE COURT: But those are prepetition agreements, right?

MR. KIRPALANI: They are but --

THE COURT: But leave aside adequate protection.

MR. KIRPALANI: Okay. But that is one thing.

THE COURT: We can deal with that in a minute.

MR. KIRPALANI: The second thing, Your Honor, is they could file an objection to the payment of any junior administrative expense claims or nonessential junior administrative expense claims. I don't think Your Honor's prior DIP orders would permit the payment of junior administrative expense claims or rank and file administrative expense claims in the face of an unpaid superpriority administrative expense claim, Your Honor.

THE COURT: No. But I guess the point -- I mean, if the debtor doesn't pay on December 31, under your argument, wouldn't your clients have to take remedial action?

MR. KIRPALANI: I don't know if it's remedial, Your Honor.

THE COURT: Well, wouldn't they have to take action?

MR. KIRPALANI: They would have to -- they could object to various other things that are happening in the bankruptcy case as a creditor, Your Honor.

THE COURT: But --

MR. KIRPALANI: Remedial, to me, means foreclosing on collateral.

THE COURT: Well, you've also sued to collect on a judg -- you can sue, right?

MR. KIRPALANI: Right. But 7.01 talks about other things. It doesn't say about bring lawsuits.

THE COURT: Well, it says “any remedy.” The best remedy I know of is suing on a judgment.

MR. KIRPALANI: But, Your Honor, we don't need to sue on a judgment because Your Honor already has a Court order that requires them to comply with the credit agreement.

THE COURT: But you still have to enforce it, right?

MR. KIRPALANI: Well, I guess, Your Honor, if we don't enforce it -- I think we do have the right to enforce it, Your Honor, just to be clear. But if you're asking me to assume for a minute that the collective action, the way it's drafted in this credit agreement, even though it ignores footnote 3 in Beal Bank, is supposed to preclude all actions by

all lenders, I don't think the remedy is limited to suing to enforce. I think there's still --

THE COURT: No. Of course it's not limited. But there's --

MR. KIRPALANI: I think the remedy that's more likely, Your Honor, because no lender, at least that I represent, wants to seek the liquidation of this company on January 1st. But there are certain things, Your Honor, that we do want. And one of them is to avoid payment of administrative expenses of hedging counterparties that seek to terminate their contracts. Those are nonessential payments that don't benefit the estate, Your Honor. If there's money for them, they'll have their administrative expense claims.

THE COURT: But my question really goes to this point, which is there's a remedy section of the operative document here, 7.01. It deals with remedies. As far as I can see, it's the only remedial section in the document. And it seems to me, 2.28 has a cross-reference to that section. So the only other provision that I think you can hang your hat on is 2.13(c). And I think what you're saying there is that's self-executing. You don't need to assert a remedy.

MR. KIRPALANI: A DIP order that's approved by this Court makes it self-executing.

THE COURT: But the DIP order itself provides that it won't be amended subject to the written consent of the agent.

So, you know, there are -- the DIP order, again, is subject to the consensual arrangements here. So I --

MR. KIRPALANI: Well, Your Honor, we can go through those points.

THE COURT: But all I'm saying is, it seems to me ultimately your point is that the debtors cannot contract around an obligation to pay on maturity.

MR. KIRPALANI: I think that's correct.

THE COURT: But it does seem to me, however, that the agreement permits the required lenders to contract around enforcement.

MR. KIRPALANI: I'm not sure it does say that, Your Honor. In fact, I don't think it does say that. I think it says that the agent may and, at the direction of the required lenders, the agent shall. There's nothing in the agreement that says the required lenders shall tell the agent not to do certain things. There's nothing in there that says that. That's an interpretation that the debtors are proposing along with the interpretation that that remedial provision is exclusive.

THE COURT: But that was the argument my former partner made and was outvoted on in Beal Bank.

MR. KIRPALANI: But, Your Honor, Beal was very clear that this case is an historic case and that in the future, remedies should be more spelled out --

THE COURT: You don't think that was --

MR. KIRPALANI: -- than what they were in that case.

THE COURT: Well, that cuts both ways, doesn't it? I mean --

MR. KIRPALANI: I don't think -- no. I think it cuts against the debtors, Your Honor.

THE COURT: I mean, the case law on these types of issues goes back a long way. It goes back to the 30s and most of it's in the indenture context. But there, the onus generally is on the party trying to get around the limitations on remedy provisions.

MR. KIRPALANI: I'm glad you mentioned the indenture context, Your Honor, because I think that all of these cases deal with issues such as the no-action provisions in indentures, such as accelerating, such as taking actions that are really collective actions. None of them, including Beal, involves nonpayment at maturity by the borrower. None of them. This is an interpretation that is strained to the logical -- the illogical extent, Your Honor, that a loan agreement can remain unpaid, a superpriority DIP loan agreement, to boot, can remain unpaid in a bankruptcy court in this district while the debtors continue to operate using DIP proceeds and cash collateral without unanimous extent -- without unanimous consent, Your Honor.

THE COURT: But the agreement --

MR. KIRPALANI: There's nothing that supports that.

THE COURT: But the agreement says what it says. I mean, people put these provisions in here.

MR. KIRPALANI: But, Your Honor, the agreement also says what shall happen on the maturity date. And that isn't happening. So what's left grey, I would argue completely grey, is what happens to this estate on January 1st. There's nothing in there that says that the debtors cannot pay that, be in breach of the agreement simultaneously seek to enforce the agreement and amend it. There's nothing that talks about this radical, never-before-happened situation, Your Honor. This is a first time for this to happen. And I think, Your Honor, you're making the first decision on it.

THE COURT: But I guess -- you certainly get into the collective action issue immediately at that point. It only takes one -- how many people are lenders under this agreement at this point?

MR. KIRPALANI: I believe -- don't know, Your Honor. I assume many.

MR. BUTLER: Several hundred.

THE COURT: It just takes one out of a hundred to start putting liens on the assets.

MR. KIRPALANI: Well, everything's already pledged to them, Your Honor.

THE COURT: They could start -- it doesn't matter.

They can start enforcing. That's collective action written in spades, isn't it?

MR. KIRPALANI: But Your Honor keeps talking about in terms of enforcing. I haven't said that lender can come to court, file a demand for payment. What I've said is that in the absence of payment of the superpriority administrative claim in this court, a lender could object to the payment of junior claims. And I don't think there's anything in that credit agreement that would prevent that.

THE COURT: But I think you're mixing apples and oranges, though. There is the issue of granting the liens on the hedging. But I don't see how you get away from the collective action issue on remedies because if you don't read the DIP agreement under 7.01 as saying that this is how the agreement is enforced upon an event of default, including a payment default upon maturity, then your one out of several hundred can do pretty much whatever they want to do or be bought off.

MR. KIRPALANI: Well, Your Honor, those several hundred superpriority administrative expense claims that are unpaid at maturity.

THE COURT: I understand.

MR. KIRPALANI: So --

THE COURT: But it seems to me a reasonable interpretation of the agreement to say that the parties who

drafted this didn't want that to happen. They didn't want to have hedge fund X holding up the debtor.

MR. KIRPALANI: But, Your Honor, there is no qualifier in Section 2.13(c).

THE COURT: Well, it says the debtor shall pay, I understand. But the debtor has pretty well said they're not going to pay under the accommodation agreement. So at that point, there has to be some form of enforcement action, doesn't there?

MR. KIRPALANI: I mean, there can be all sorts of actions.

THE COURT: In the event of default -- there's an event of default. 7.01 says what happens when there's an event of default. The event of default is the debtor hasn't paid on maturity. So, at that point, it seems 7.01 kicks in.

MR. KIRPALANI: Again, there are many things that creditors can do in bankruptcy cases that, I think, would not amount to remedial action under a credit agreement such as objecting to the payment of other claims.

THE COURT: That's fine but --

MR. KIRPALANI: Such as making motions to the Court.

THE COURT: -- it strikes me that the argument you're making, though, is one that says that the remedies provision doesn't apply at all on the maturity date.

MR. KIRPALANI: Well, because I think, Your Honor,

what I believe is happening is that they are extending the maturity date. And I think they are trying to do that by saying everything but extending the maturity date. And I think it is for this Court to determine whether or not the substance of what they're doing is actually to do that because that is the liquidity runway they're seeking. They've sought it and they've done exactly the same thing that they've done twice before, tried this time and couldn't get it. And they are relying on reading, I guess, provisions that, frankly, deal with acceleration events contrary --

THE COURT: But right under its terms it's not limited to an acceleration event.

MR. KIRPALANI: I didn't say it's limited, Your Honor. It's not limited. But there are provisions in this credit agreement that simply cannot be reconciled. I know Your Honor believes that it can be, or at least you're arguing to me it can be, because 2.13(c) just says the debtors shall pay but doesn't say how can you make them pay. And then you go to 7.01 and say well, the only way to make them pay -- I'm just saying, Your Honor, I think there are other ways to make the debtors either pay or change the way they operate their business. But none of my clients, I'm suggesting, are interested any of those things. There may be others who are and I'm not sure this credit agreement can stop them from doing that. I think what's happening here, Your Honor, is very ill advised. And I'm not

saying it's going to be by my hand.

THE COURT: Okay.

MR. KIRPALANI: But I'd like to continue, if I can, Your Honor.

THE COURT: Yeah. Why don't we move to the other points?

MR. KIRPALANI: Because I do want to talk about the priming issue. It's very central and it's very important. The debtors are telling all lenders to stand still on December 31st but at the same time, Your Honor, they're seeking to give away 200 million dollars of our collateral to currently unsecured hedging counterparties. If Your Honor would just look at your own DIP order of January 5th, 2007, which is the next slide, Your Honor, it has a number 4 on the bottom, we read your DIP order, Your Honor, as protecting us from being primed. It says "No claim or lien having a priority superior to or pari passu with those granted by this order to this agent and the DIP lenders shall be granted or allowed while any portion of the financing or any refinancing thereof or the commitments thereunder or the DIP obligations remain outstanding."

We submit, Your Honor, that even if the Court does not deny the motion outright as a disguised maturity extension request, the Tranche C lenders undeniably had a right to rely on Your Honor's DIP order that no other liens would be granted until they were paid in full. It is the type of provision --

THE COURT: What about 13(b)?

MR. KIRPALANI: Coming to it, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: If I can just have one minute, Your Honor.

(Pause)

MR. KIRPALANI: I'm sorry. I thought you were going to ask me about the provision the debtors cite, which was 6(d) which I think is irrelevant to the issue, but I was going to tell you why. But I'll take a look at 13 --

THE COURT: Well, 13(b) provides for modifications or extenses of the order with the prior written consent of the agent where it says "It shall not be modified or extended without the prior written consent of the agent."

MR. KIRPALANI: Well, I think what this -- I think, Your Honor, when you read this provision along with the provision that says there shall be no liens, the only way to reconcile them, Your Honor, is that if the Court were to grant that, there does have to be an analysis as to whether or not the liens being primed are adequately protected. And I know Your Honor mentioned that you thought that was a prepetition concept and I talked to lots of practitioners in the last few weeks about whether, in fact, it is a prepetition concept, and I've been researching it extensively. I think if it was a prepetition concept and if a case had so held it was, the

debtors would have cited that.

THE COURT: No. I don't --

MR. KIRPALANI: They didn't.

THE COURT: I think what I said was the case is -- or the agreements you were citing to me were all in the prepetition context.

MR. KIRPALANI: Oh, yes.

THE COURT: My issue with the adequate protection point is that the parties sat down and negotiated a DIP agreement. And they're certainly very sophisticated. They dealt with each other at arm's length. There were extensive fees paid in connection with it. And it strikes me as odd that the parties would go through that exercise, which spells out exactly what the respective rights are, if then they were to have overlaid on it the vagaries of adequate protection. I mean, isn't the DIP agreement itself a consent as to what the debtor can and cannot do with the collateral? It spells out what the debtor can do and what the debtor can't do. And, of course, you'd never need to get the adequate protection if the secured lender consents. You don't even need to provide adequate protection of the cash collateral if the secured lender consents.

MR. KIRPALANI: I think while that's true, Your Honor, the situation we have here is different because this is not a situation where this DIP is in compliance, coasting

along, paying all of its obligations as and when they come due with no anticipatory repudiation of the same. This is a situation where the debtors are announcing that they will be in breach of this agreement and, at the same time, trying to enforce the very same agreement against lenders by saying we're entitled to amend this agreement now and prime you. I think the Court does have the power, and I think the DIP lenders do have the right to request that the Court take a look at what is happening to their lien position and do they or do they not have an interest in property that's protected. And did they or did they not expressly waive any rights to request that. And I think the answers to those questions, Your Honor, are in favor of the DIP lenders and not in favor of the borrower. Not under the circumstances that we have here, Your Honor. And it may be that these circumstances will never come up again but these are circumstances that for three, four billion dollars of DIP lenders are very serious because those credit markets that everyone talks about affects all of them as well, not just the industry.

Your Honor, just to make sure I cover it, the debtors cite Section 6(d) of the DIP order that purports to state that the unsecured hedging obligations are permitted under the DIP credit agreement under Section 6(d). That's what they rely on in their papers. And all I would point out, Your Honor, is that that's incorrect. It's an incorrect reading of 6(d).

6(d) says "other than with respect to" -- this is the next slide, by the way, Your Honor -- "other than with respect to any liens or security interests arising after the refinancing date and permitted under the DIP credit agreement to be senior to the DIP liens". The hedging agreement liens are not senior to the DIP liens. The reason why it's simply a square peg in a round hole is 'cause the provision that that paragraph relates to is 6.01 of the credit agreement which talks about things that Your Honor has seen many times, state law, mechanics' liens, warehousemen liens, etcetera. That has nothing to do with what is happening to the DIP lenders in this motion, Your Honor.

I think it's clear, I don't need to belabor it, that, in fact, what is happening is there is 200 million dollars more of secured claims being put ahead of the DIP lenders or ahead of the Tranche C lenders in pari passu with the A and the B lenders, Your Honor.

Now, with respect to this issue, and this is important, the debtors have created what I would call an elaborate rationale after the fact.

THE COURT: Well, before we get to that, is this an amendment issue or is this an adequate protection issue?

MR. KIRPALANI: I think it's both, Your Honor. I think in the first instance, it's an adequate protection issue. If Your Honor believes that implicitly that the lenders have

consented to be primed to the tune of as many billions of dollars as the agent and the borrower shall determine or the required lenders shall determine over and above the C lenders without regard to their interest in the collateral and what it does to them, then, Your Honor, I would attack that this is judgment of it because I think it's after the fact and I think it's fabricated, Your Honor.

THE COURT: All right. But is it -- does the DIP credit agreement prohibit the imposition of these liens?

MR. KIRPALANI: There's nothing expressly in the DIP credit agreement that prohibits or permits these liens, Your Honor. There's a general amendment provision, which is what the debtor is relying on, that says the debtors may amend this credit agreement with the required lenders. But elsewhere in the agreement and in this order and in your DIP orders, Your Honor, that amount was 150 million dollars. And so our position is if that amount is getting increased, it needs to be clear that we are adequately protected.

THE COURT: But again, the -- okay. So it sounds to me, then, it is an adequate protection issue and not a --

MR. KIRPALANI: I think in the first instance it is. And if Your Honor believes that we're not entitled to adequate protection because the credit agreement, as Your Honor was suggesting, may have impliedly consented to this basket being upgraded, expanded to how ever much the debtors ask and receive

required A/B lender consent for, then we do have to look at what is the business judgment rationale because I'm not sure the debtors really disagree that we need to be adequately protected, Your Honor. The debtors' opening motion suggests that they are providing adequate protection to the DIP lenders. They cite Section 361 in paragraph 51, they cite a litany of things that they believe are adequately protecting the DIP lenders and those are things that are their burden.

But to the extent that -- the debtors also try to argue, which they do repeatedly, that there is a business judgment reason why they should be granting priming liens to hedging banks that also happen to be Tranche A lenders. They will tell you, Your Honor -- Mr. Butler will tell you that these six so-called relationship banks would otherwise have used the maturity date of the DIP as a cross-default and immediately terminated their out-of-the-money hedging contracts and crystallized 350 million dollars of accelerated administrative expense claims against the debtors. These purported justifications, Your Honor, do not withstand the slightest scrutiny. The notion that the debtors are concerned about a 350 million dollar administrative expense claim going unpaid on January 1st when a three and a half billion dollar DIP superpriority administrative claim is going to be unpaid at January 1st and is senior in payment unless this accommodation agreement is entered, to any of those hedging obligations

doesn't even pass what I would call common sense scrutiny, Your Honor. In fact, even if the debtors were to try and pay the 350 million dollars -- unclear why they would do that for an outside the ordinary course of business claim like that in the face of DIP defaulted maturity. But if they tried to, I am sure, Your Honor, there would be objections to that and Your Honor would look at your own orders in the absence of this lien being granted and say they simply are not entitled to be paid until the superpriority claims have been paid. And even if Your Honor were to allow the payment, these six banks are good for the money in the event, Your Honor, that there had to be some adjustments made because the superpriority administrative claims were not paid in full. That would still be a better and more fair result, Your Honor, than giving them liens just a month before their so-called threatened termination. Giving them liens would trump us.

THE COURT: But in terms of the business judgment, doesn't it all come down to who has a limitation on collective action and who doesn't?

MR. KIRPALANI: Well, I would argue, Your Honor, that if they don't have a limitation on collective action, we can play out that stream. What would they do? Right, Your Honor? They would come to Your Honor and they would say, aha, here's my motion for payment of an administrative expense claim returnable on twenty days' notice. I'm due -- JPMorgan Chase

says I'm due X hundreds of millions of dollars. And I believe, Your Honor, there would be a couple of hundred, to use Mr. Butler's words, of objections to that. And I think that Your Honor would look at the DIP orders and say I don't think I can pay this because it violates the priority scheme that I carefully set out to protect those couple of hundred of DIP lenders putting aside collective action remedies. That's what I was trying to get at at the outset.

And, Your Honor, in addition, again, if they're not liened up and that money does go out the door to them, it may be subject to disgorgement in the event that it has to be. And I think the case law on that is clear, Your Honor. At least it's better than having them prime us, get first liens, and so that they can never be seen from again.

THE COURT: But what is the next step --

MR. KIRPALANI: I think --

THE COURT: -- after the Court says I deny your motion to be paid because there's not enough money to go around?

MR. KIRPALANI: I think they'd seek to lift the automatic stay. If you're thinking, Your Honor -- if you're suggesting that they would be able to take some sort of action or foreclosure type action or judgment type action in this court, which would be the exclusive place they could do that, they would need to move to lift the automatic stay and I think

Your Honor could dispose of that rather quickly. These are six banks, Your Honor. This is not going to be, you know, some earth shattering event.

And, Your Honor, these are amounts that the debtors would pay in the ordinary course as they run off. It's about seventeen million dollars a month as they run off. We're talking about going from, Your Honor, from January 1st to February 27th when the debtors propose to have a plan on file.

THE COURT: Doesn't that cut the other way?

MR. KIRPALANI: It doesn't, Your Honor, because if that plan fails, they just leapfrogged us. They just leapfrogged us by the tune of 200 million dollars whereas what is the harm to them? If Your Honor were to balance the harms as to whether to grant their motion or grant their lift of the automatic stay, I think Your Honor would say the debtors are in the middle of trying to negotiate a plan which would pay administrative claims in full and your request to lift the automatic stay is denied. These six banks should stand still the same way that hundreds of lenders have agreed to stand still and let this debtor do what it needs to do.

The business judgment, Your Honor, is nothing but an afterthought. The debtors offered this preferential treatment to hedging banks in order to get their vote for the Tranche A of the DIP. Mr. Sheehan himself stated on the lender call -- oh, I'm sorry I can't -- he doesn't recall stating that he was

asked and gave that answer. But, Your Honor, silence sometimes speaks volumes when you read the debtors' motion papers. If this was unchallenged by us and other lenders, query whether it would ever have come to light in this Court, if you read the motion papers, it doesn't talk at all about this grand difficult challenging situation they have with these hedging counterparties that if this would not have happened, as part of their affirmative motion, Your Honor, they have told Your Honor nothing about why this is important.

The common sense challenge that I've talked about before, I think, really does ring true, Your Honor, when you think about it. I still believe, Your Honor, the business judgment standard is the wrong standard because I think it is an adequate protection issue. But again, I think that, since the debtors are going to come before you and argue that no, this is something that they need to be able to do in their business judgment and not pursuant to Section 364(d), even though they do cite Section 364(d) in paragraph 51 of their motion, I think Your Honor needs to look to what are the justifications for doing it. And the justifications for doing it are only one because, if Your Honor recalls, Mr. Sheehan testified, and it's Exhibit 26 in the exhibit binder, pages 29 and 31. This was JPMorgan's original request for an extension of the maturity date, an outright extension, which would have accelerated no hedging counterparties. And on page 31, it says

"We seek to give additional collateral to hedging counterparties" as part of this extension. So for the debtors to stand here before you today and say this is exactly why we're doing it, Your Honor. We're doing it because we're worried about the cross-default and

THE COURT: Well, under either scenario, when you're negotiating an extension, you're playing against the fact that there otherwise will be a default. I mean, they -- it's no secret to JPMorgan that the alternative to agreeing to an extension of the maturity date is that the maturity date comes and goes. And in addition to being able to exercise the remedies under the DIP agreement, each counterparty of the hedge has a cross-default provision.

MR. KIRPALANI: No. I'm not following you, Your Honor. I'm saying that when they were going to extend the maturity date, that would have eliminated any cross-default --

THE COURT: But it's all with the --

MR. KIRPALANI: -- and they still said here, take some liens.

THE COURT: But it's all with the backdrop of there otherwise being a cross-default. So, of course, you're going to say we're getting you off the hook of not only a default under the credit agreement, the DIP agreement, but also a default of the hedge agreement. So we want to get compensated for that.

MR. KIRPALANI: Well, Your Honor, I'm saying that that was an afterthought, that that rationale --

THE COURT: It wasn't an afterthought by JPMorgan. They knew exactly what they were doing. They said --

MR. KIRPALANI: JPMorgan asked for it even though they had no right to it.

THE COURT: But they --

MR. KIRPALANI: -- even though they had no ability to cross-default.

THE COURT: But they would. They would as of --

MR. KIRPALANI: No, they would not.

THE COURT: -- December 31.

MR. KIRPALANI: Not if the DIP had been extended.

THE COURT: But it's only extended if they agree. And they're not --

MR. KIRPALANI: Oh, okay. So Your Honor is saying that it is absolutely prudent and okay for the debtors to give collateral on account of one lender's position somewhere in the capital structure.

THE COURT: No, no. I'm not saying that. I'm saying that the notion that there was no cross-default under the original scenario really begs the question because the original scenario was to avoid a cross-default. It was just to avoid a cross-default in respect of an extension as opposed to an enforce -- a forbearance issue.

MR. KIRPALANI: Sure, Your Honor. The only point I'm trying to make, though maybe I'm not making it clearly, is that there is no need to pledge and give additional collateral to a hedging bank unless there's going to be a cross-default.

THE COURT: Right.

MR. KIRPALANI: That's on --

THE COURT: But under either scenario --

MR. KIRPALANI: And then JPMorgan has filed papers -- JPMorgan has filed papers saying we would not require the collateral in order to forbear. I mean, Your Honor, this whole thing -- and I know it's difficult because Your Honor is only hearing whatever is brought before the Court. But the entirety of this process has been truly eye-opening for me.

THE COURT: No, but it seems perfectly reasonable for JPMorgan wearing their hedging hat to say, you know, we want collateral for that. I don't understand why they wouldn't say it. It's a -- clearly, a business call -- we didn't decide the adequate protection issue. It's clearly a business call on whether you want to play chicken with those five or six parties on that issue or not. I understand that issue. And you're saying the debtor should play chicken with them.

MR. KIRPALANI: Well, because they're playing with our money, Your Honor.

THE COURT: Well --

MR. KIRPALANI: They're playing with our 200 million

dollars.

THE COURT: Ultimately, they're playing with the fate of the case. They're --

MR. KIRPALANI: I'm not sure the fate of the case is going to hinge on 300 million dollars of administrative expenses.

THE COURT: It very well might. Under the case law in this circuit, if the debtor is faced with an active creditor who has the right to be active, in asserting the payment of a large administrative claim, the debtor faces a real risk of conversion. It's that simple. Now, maybe what you're saying is that would be a minimal risk because the counterparties to these hedges at the end of the day wouldn't do that because it wouldn't be in their interest.

MR. KIRPALANI: It wouldn't be in their economic interest because they're behind the superpriority administrative expenses.

THE COURT: Well, I don't -- you know, at the same time, ostensibly, it's not in any of the people's interest who didn't vote for an extension because it's not great for them to have a liquidation, as you guys have said. But there's that risk.

MR. KIRPALANI: Agreed, Your Honor.

THE COURT: And I guess what the debtor is saying is of the two risks, the risk that the collateral will ever end up

going to the hedging counterparties is a more manageable risk because they hope it'll run off and they hope they'll be able to confirm their plan. And I understand your point. You're basically saying that there's a risk that that plan won't be confirmed and then you'll be primed.

MR. KIRPALANI: Well, we are primed now.

THE COURT: Well, but I mean as a --

MR. KIRPALANI: You're saying that the teeth of it -- the teeth of it.

THE COURT: In terms of actually

MR. KIRPALANI: Having to suffer the fate of the priming.

THE COURT: -- crystallizing the claim --

MR. KIRPALANI: Right.

THE COURT: -- I mean, one would hope (a) that the debtors would be able to manage their hedging exposure; and (b) that they would never get to the point where people are latching on to the collateral, because that means a liquidation.

MR. KIRPALANI: Yeah. I also don't think they could latch on to collateral in this court with the DIP obligations --

THE COURT: Well, that's --

MR. KIRPALANI: -- being first priority liens.

THE COURT: But what I'm saying is the -- if the

accommodation agreement is approved --

MR. KIRPALANI: Yeah.

THE COURT: -- they're saying that the odds of having a continuing large hedging exposure and the odds of there being a meltdown scenario, those two odds together is what the debtors are saying are smaller and more manageable than going into January with every single party to the DIP credit agreement having a right to pursue remedies.

MR. KIRPALANI: I think, Your Honor, what I was suggesting is that every single party to the DIP credit agreement would not pursue remedies if they were not being primed. You know, this is --

THE COURT: Well, that's --

MR. KIRPALANI: -- you know --

THE COURT: In terms of -- in terms of --

MR. KIRPALANI: -- that this opportunity was never given to us because JPMorgan wrote the document and circulated it.

THE COURT: I've never seen the temptation to be a holdout be a stronger situation than this one. I mean --

MR. KIRPALANI: We're not holdouts, Your Honor. All we're saying is --

THE COURT: No, I'm not talking about your clients, necessarily.

MR. KIRPALANI: All we're saying, Your Honor, is that

we are being primed by 200 million dollars. The debtors have said they can use business judgment as the standard for priming, we don't think so. That's what Section 364(d) provides. If that were the case, the debtors would say I know that the greater good is here and the greater good really must come before those few that have interests in property. And my business judgment is, we should prime those few that have interests in property for the benefit of the estate.

But unless they can really show, Your Honor, that this is a case and that that result is truly likely, and I don't think I've heard anything that talks about how truly likely it is, to result in greater value for the Tranche C lenders who are being primed they can't meet that burden, Your Honor.

THE COURT: Okay. But again, 10(b) of the DIP order makes it pretty clear, I think, that the order, including the provisions on priming, can be amended with the prior written consent of the agent. And we've already established that as far as the DIP agreement is concerned, which is the only place of authority for the agent to give its prior written consent, it can be amended as to these hedging obligations because there's a very limited number of things where the DIP agreement can't be amended. I don't think this is one of them. I haven't heard you tell me otherwise.

MR. KIRPALANI: No, no. That's true, Your Honor.

I'm not telling you otherwise.

THE COURT: So the same order that giveth, can taketh away.

MR. KIRPALANI: I think it can taketh away but, Your Honor, still look to see what damage is being done to creditors with interest in property.

THE COURT: Even if they agree to this ahead of time and gave their agent and negotiated a specific set of provisions that permitted the agent to amend the agreement?

MR. KIRPALANI: I think, Your Honor, that that right to insure that your interests are adequately protected in the bankruptcy court is a right that's sacrosanct. I don't think there's anything there that accepts a waiver.

THE COURT: It's not sacrosanct if you give it up, right?

MR. KIRPALANI: If you give it up, that's correct. I don't believe that provision gives it up.

THE COURT: Okay.

MR. KIRPALANI: Your Honor, what the debtors have said in their testimony today --

THE COURT: I'm sorry.

MR. KIRPALANI: Sure, I'm sorry.

THE COURT: The very thing that you're saying creates a need for adequate protection -- the priming -- is something that the agreement permits, right? You're just relying on the

order here. So it's, sort of, a general condition that's creating the right to adequate protection. But it's a specific thing that the parties permitted to be amended.

I'm not sure it would work the other way, too: if you have a whole set of defaults would that really give the DIP lender an ability to come in and say well I need another 200 million dollars in cash collateral when there's no provision in the agreement that gives you the right to that? It's just based on a sense that you need adequate protection?

Leaving that aside, it seems to me here the very thing that your clients are saying establishes a right to adequate protection is something that the DIP agreement permits to occur.

MR. KIRPALANI: I think, Your Honor, that they have sought to demonstrate to the Court that what they're doing meets their business judgment. I think they've also pled to the Court in their motion that what they're doing does adequately protect the DIP lenders.

THE COURT: Well, I know. I told them I had problems with that because I thought they were giving away too much money.

MR. KIRPALANI: We would prefer that no money goes out, Your Honor.

THE COURT: No, I mean too much money to the people --

MR. KIRPALANI: None of my clients still get.

THE COURT: -- whose votes weren't necessary.

MR. KIRPALANI: We would prefer to take all of those fees and apply it to the senior debt, Your Honor. That would be a better use of that money, Your Honor.

But what's happening here, Judge, is Mr. Sheehan testified that the reason the original proposal before the Court was modified to provide less pay down was to give, not really Delphi a greater liquidity runway, but to give GM a greater liquidity runway. And it is that same liquidity call that Delphi is so proudly putting before us as saying this is your adequate protection. You are going to have additional liquidity below you some time in February or March. Your Honor, this is not something that, I think, any lender could rely on when the money -- the priming is occurring today and the adequate protection is being provided in February. If that were adequate protection, Your Honor, then Wimpy would be adequately protecting Popeye every week.

I think Your Honor, with respect to the issue of the fees I believe, Your Honor, it is one of the slides in front of you, it is the very last slide Your Honor, and I won't talk about the numbers out loud.

THE COURT: Uh-huh.

MR. KIRPALANI: But the debtors are telling you, and will tell you, that these fees are also part of their business

judgment. When you look at the size of the DIP facility the fees that are being paid are really not that extraordinary. I would say for one month's worth of work, Your Honor, JPMorgan's fee is quite extraordinary.

I would say that the purported evidence from Mr. Sheehan of what some of these other arrangers did in order to obtain a fee, such as give comments back and forth on the accommodation agreement, Mr. Sheehan also testified in his deposition that the Tranche C collective, and in particular some of the larger holders of Tranche C loans gave much more extensive comments and spent much more time trying to reach an accommodation. Many of those comments is what did garner additional support from other parties. And yet we requested no fee.

The concern that we have, Your Honor, is about process. It is about, one, granting hedging counterparties collateral in exchange for their vote. Two, granting fees, truly, in exchange for their vote. I understand this is extraordinary, Your Honor, but the Court is the arbiter of what is extraordinary and what is impermissible, Your Honor. And we believe what's happened here is impermissible. Nothing further, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: Thank you, Judge.

THE COURT: Thank you.

MR. SUSSMAN: May I approach, Your Honor?

THE COURT: Sure.

(Pause)

MR. SUSSMAN: Ronald Sussman, Cooley Godward Kronish on behalf of Greywolf Capital Management, Your Honor.

As always, Susheel Kirpalani being his articulate self I'm not going to reiterate all of the things that he said, I'm just going to let you know that Greywolf joins in the objection. And the one additional comment I'll make is that if the Court were to decide to overrule the objection and grant the debtors' motion, we'd ask you to strike any provision of an order that gives up our ten days to appeal. Thank you, Judge.

THE COURT: Okay.

(Pause)

MS. ELKIN: Good afternoon, Your Honor. Judy Elkin for Calyon. I too am not going to repeat everything Mr. Kirpalani said but I do want to answer one question that the Court had that I disagree with Mr. Kirpalani on.

The Court asked if there was any provision in the credit agreement that prevented changing the amounts of the hedging that was given pari passu and to allowing a bump of the lien amounts. And, Your Honor, I think it's a pretty general rule of contract construction that the specific overrides the general. So I'd like to point out to the Court two other sections of the credit agreement that we haven't really

discussed.

One is the part of Section 10.09 which -- 10.09 is not it's (iii). It's on page 95 of the credit agreement. And it specifically says that the consent of all the lenders is required. And (iii)(C) to amend or modify the superpriority claim status of the lenders contemplated by Section 2.25.

And then I would ask the Court to look at 2.25. Because the way I read 2.25 the superpriority claim status that was granted to the A and B lenders included those liens that existed on the closing date, which are those liens that are set out in the credit agreement which are a limitation on the hedging to 150 million. It is not this additional 200 million.

And while we can go back and forth to say that there are some general provisions in the credit agreement or in the order that lets the agent modify 10.09 of the credit agreement and 2.25 require a modification of superpriority claim status and the liens being granted to the A and B lenders to only be done with a hundred percent consent.

THE COURT: But isn't “superpriority claim” defined as a superpriority administrative expense claim? It's not talking about collateral.

MS. ELKIN: If you read through all of 2.25, which I'm not going to do right now, I read it to include -- it includes the collateral, it includes the lien status and it includes the superpriority administrative claims.

THE COURT: Okay. But (C) on page 95, in 10.09, the language that requires unanimous consent, it says amend or modify and then it uses, in uppercase terms, “superpriority claim” status.

MS. ELKIN: Right.

THE COURT: The definition of “superpriority claim,” on page 29, just refers to administrative expense claims under 503 and 507. It doesn't cover collateral.

MS. ELKIN: It doesn't cover collateral but it also covers -- it doesn't necessarily cover collateral but it covers the superpriority liens.

THE COURT: It doesn't under the definition. It just refers to a claim, against the borrower orany guarantor, which is an administrative expense claim.

MS. ELKIN: Right. But the administrative expense claims that are granted superpriority status, the priority structure of 2.25 gives that priority to the A and B lenders over the hedging lenders except for 150 million dollars. It doesn't have in there that at any time you can increase that amount. Because if you're doing that you're, in effect, modifying 2.25 superpriority status. You're diluting it. You're basically diluting the claims of the A and B lenders and you're diluting their collateral pool.

THE COURT: Okay.

MS. ELKIN: Your Honor, I think it's important

that -- I mean, I understand the concern that everybody has here, which is what happens if we don't approve this, does this debtor go into liquidation. And that's not anybody's goal here. But I don't think that you can use that threat to abrogate a contract which clearly requires that certain things be done with the consent of a certain amount of the lenders. And I know there's been a lot of talk about the Beal case. And I think the Beal case is distinguishable. I'd also point the Court out to another case that held that lenders -- that you cannot modify the terms of a credit agreement that require a hundred percent without the hundred percent, notwithstanding that you can use waiver language and try to get around it. And that's Citadel Equity Fund vs. Aquila. It's 371 F. Supp. 2d 510, 516 (S.D.N.Y. 2005), which is the District Court opinion. It was affirmed by the Second Circuit.

Your Honor, we think that it's important in this district that DIP lenders be given the benefit of their bargain and that includes being able to rely on a credit agreement that provided that they had certain claims and that only certain other amounts of claims were to be treated equal with them or junior to them and not to have those claims elevated every time the business judgment. Because if you can use the business judgment to get around a DIP credit agreement then there's no sanctity in DIP credit agreements.

THE COURT: But that's not what the debtors are

purporting to do here. They say they have a contractual right to do it.

MS. ELKIN: I agree they say they have contractual rights to do what they're doing, but I think that the terms of the credit agreement require -- this is not just a forbearance agreement. You asked Mr. Kirpalani a question but you can really turn that on your head. Which is these five or six, whatever number they are, of the hedging lenders said we won't agree to an extension unless you agree to cover our potential trading and give us additional collateral. So you have, here again, the potentiality for five or six holdout lenders. But if this was just a simple forbearance agreement it would simply say we agree, the required lenders because that's all that's required, we agree we're not going to exercise remedies, period. And those five lenders, so what? So they wouldn't be out there. The other lenders would agree not to exercise remedies. They would declare a default under their hedging agreements and they would try to come to this court. And as Mr. Kirpalani said, we would have to deal with that in court.

But now instead of just dealing with a pure forbearance agreement which, under New York law is simply an agreement not to exercise remedies. It's not tacked on to an agreement to elevate unsecured debt to secured debt and to dilute the priority --

THE COURT: Well, forbearance agreements frequently

have provisions providing for payments, pay downs, liens, all sorts of things.

MS. ELKIN: They do, Your Honor, but they're also within the bounds of the credit agreement that permits a certain number of lenders to vote on this.

THE COURT: But that's what we keep coming back to. I think in terms of the issues here, it just seems to me that clearly if the debtor were able to compel other groups of creditors to stand still, like the hedging lenders, they would do that. But the issue is, do they have the right, given the votes that they've gotten, to compel this group, right?

MS. ELKIN: That is the issue, Your Honor. Whether under this credit agreement the actions they are seeking to take, which as Mr. Kirpalani said at length, is form over substance an extension of the maturity date and in our mind a dilution of the liens and the collateral pool that we signed up for, that that has to be done with more than sixty-eight percent of the lenders.

THE COURT: Okay.

MS. ELKIN: Thank you.

MR. NEIER: David Neier, Your Honor. I'll be very brief. We would join in the comments of the other objectors, Mr. Kirpalani, Ms. Elkin and just add two thoughts.

First, with respect to voting, on the same page that Ms. Elkin was referring to that is page 95 of the DIP credit

agreement, the way we read it, and it's about half way down the page under (iv), it's actually (E)(iv). You require all of the Tranche A lenders and Tranche B lenders to amend the definition of required lenders or the definition of supermajority first priority lenders. We think the accommodation agreement does amend the voting provisions under the DIP credit agreement in a way that's not permissible.

The debtors' argument is that they're simply creating this alternate reality under the accommodation agreement where you have different voting, which will be just those lenders who consented to the accommodation agreement. And then at the end of the accommodation period you'll snap back to the voting provisions under the DIP credit agreement. We think that's really inappropriate.

Under all circumstances voting provisions should remain the same. That was something that was agreed to and all lenders, all A and B lenders, have not allowed the debtors to amend the DIP credit agreement standards with respect to voting.

THE COURT: Let me make sure I understand this, though, and maybe I'm wrong about this. It seemed to me that the changes in the voting definitions in the accommodation agreement dealt only with specific provisions of the accommodation agreement.

MR. NEIER: That's correct, Your Honor.

THE COURT: So that, for example, if --

MR. NEIER: They would be --

THE COURT: -- Delphi proposed next week to extend the maturity date it would have to still get unanimous consent. It couldn't say we caught you, now we've modified the definitions in the accommodation agreement, and we only need the accommodation agreement.

MR. NEIER: That's absolutely correct, Your Honor. What I think is problematic is to have a loan document out there that doesn't respect “required lenders.” And I think that's inappropriate and I see no reason for it. They're doing this in two ways. One, they're saying only consenting lenders can vote with respect to anything in the accomodation period, such as the milestones that have to be met by the debtors. And, two, they're adding hedging obligations as a participating lender and I can't really see how that really affects anything in the accommodation period but I think it's unwise and inappropriate to do so. I think the vote should always be “required lenders” and we shouldn't create this alternate reality for the next six months under the accommodation agreement. We should leave everything at required lenders. That's the first point.

The second point, Your Honor, is we had -- as somebody who has a 401K that's really a .401K at this point -- we had an extraordinary rise in the stock market last week. We

had a seventeen percent rise in the stock market. We had commodities rising for the first time in a long time. We had the dollar falling against most major currencies, including the Mexican Peso. And so what happened to the debtors' exposure, in one week, the exposure went -- their hedging exposure went down from 400 million to 300 million. But we've all learned our lessons, okay. There can be a reversal of that trend almost overnight if not overnight.

And as a result, to have the hedging banks allowed to terminate the accommodation agreement if their exposure exceeds 500 million dollars when they're already at 350 million dollars, I think is also an inappropriate grant to the hedging obligations. I think if we're going to have an accommodation period it shouldn't matter what their exposure is. They're getting liens up to 350 million dollars, with the additional 250 million dollars. And I join in my colleagues' objections with respect to that. But I think it's unwise and inappropriate to have, then, a termination of the accommodation agreement with respect to the hedging obligations if their exposure exceeds 500 million. Then they will have a 350 million dollar A/B lien -- the same pari passu with the A/B liens. And they will have additional exposure that will all become crystallized.

Yes, they can't move to foreclose on their rights during the accommodation period, but that's not enough. They

shouldn't have this additional right to terminate the hedging obligations if their exposure exceeds 500 million dollars at any one time. Thank you, Your Honor.

THE COURT: I guess you're up, Mr. Butler. Before you start, I have a basic question, which is what is different under this accommodation agreement, which acknowledges that the maturity date will come on the 31st? What is different under that set of facts then from an extension?

MR. BUTLER: There are a number of things that are different, Your Honor. We've called some of them out in footnote 10 of our original omnibus reply.

The accommodation agreement provides for forbearance during a default rather than an extension of the maturity date. The maturity date is not extended, the loans are due, there are defaults. And what we deal with under the accommodation agreement are the terms and conditions under which the required lenders have directed the administrative agent not to act. And candidly the agreement itself could have been simply a two-page agreement had we been able to extract that from the required lenders which simply had said I direct the administrative agent not to act pursuant to the credit agreement. We couldn't do that because the required lenders and the administrative agent required a number of conditions, which is commonplace in those kinds of agreements as the Court acknowledged, in doing it. But that agreement, the accommodation agreement, just deals

with post-default remedies and other matters.

The fact is that the maturity date will occur on December 31st and there are a number of consequences to the debtors as a result of that. For example, the Tranche A commitment will terminate. We will no longer be able to borrow under our DIP credit agreement. Number two, interest will begin to accrue at a higher rate of interest, pursuant to the credit agreement, an additional 200 basis points.

Number three, we will no longer be able to borrow or to accrue interest on a LIBOR basis but instead we'll have to deal with base rate loans. Number four, we'll be required to cash collateralize outstanding letters of credit as we go through and deal with those issues. Those are four major examples.

THE COURT: These are things that are required by the credit agreement? They're not impositions in return for getting forbearance?

MR. BUTLER: Correct. These are the operation of the credit agreement. When the credit agreement -- when you are post-maturity there are things you cannot do under the credit agreement and things that you have to do. So these are -- I'm giving you just some examples of it. So the fact of the matter is this company will be dealing with a DIP agreement which has matured but which we have received and entered into accommodations by the required lenders.

At the front end of this presentation, Your Honor, in trying to be responsive to the objections that have been raised I want to be clear, because this hearing is being widely covered and there was something not discussed at all by the objectors during the course of this presentation today. And that is that what we're dealing with here is an inter-creditor dispute. And the real question that is before the Court, as the Court points out, is what are the contractual rights of the parties under the post-petition DIP credit agreement?

And the liquidity runway that Mr. Sheehan has talked about here, and having transparency that we are able to use the contractual terms of the credit agreement in a manner that will continue to provide a liquidity runway, is important not just for the people in this courtroom, but the fact of the matter is that there are many, many parties outside of this courtroom who are waiting to hear the published reports of whether this is approved because the fact is that there are hundreds and indeed thousands of parties that are extending hundreds of millions of dollars of post-petition, unsecured trade credit to this company on a continuing basis.

And there's General Motors who's offered to make available another 600 million dollars worth of liquidity, just as they funded the extraordinary needs of the company during the course of 2008, on the basis that this accommodation agreement is approved.

And so, what we need to be able to convince our administrative creditors, our suppliers, employees, other contract parties, our customers, we need to be able to demonstrate to them that we have an interim solution pending an ultimate disposition of this case through a plan of reorganization, that we are able to, in this extraordinary economic and automotive environment, that we're able to provide them, those administrative creditors, the transparency of a liquidity runway. If the debtors are unsuccessful in that goal and can't satisfy those creditors then they will stop supporting the company.

And that's really what this is about. The company would have preferred that there had been a third extension of the DIP. The reality is, over the last six months a lot of this DIP has traded, people have bought in at substantial discounts to the DIP, it's in different hands -- many aspects of the DIP. And when it came through to seeking, again, a unanimous concurrence of an extension which would have allowed us to continue to borrow under the DIP, to continue to have LIBOR loans, to continue to do LCs in the normal course and all of the other benefits you have under a credit agreement that is continuing to operate, we could not get it. With the administrative agent we tried to get it; we fell short of a unanimous view. And therefore we moved to implement the provisions of the credit agreement that would allow us to enter

an accommodation agreement with respect to remedies and with respect to how and under what circumstances the required lenders would direct the administrative agent to seek to have the loans paid over to the DIP lenders.

And so, I recognize and I respect the inter-creditor dispute that is here but I think it's extremely important when you talk about business judgment here, we're not coming to the Court, and I think the Court recognizes, the debtors aren't coming to the Court saying Judge, we have a really good business reason why you should rewrite the contract. That's not why we're here. We have a really good business reason to enter into an accommodation agreement that is contemplated by and authorized by the credit agreement, that does not do violence of the terms of the agreement but in fact implements it so that we have the ability to provide this liquidity runway for all of our stakeholders. And hopefully over the next six months be able to bring resolution to this case. And that is, I think, fundamental to why we are here.

The liquidity that's going to fund this case over the next six months are the continued support of our administrative creditors who have, when it's approved, that transparency and through the 600 million dollar facility approved by Your Honor previously this morning.

In terms of looking at the objections, and I'm not going to go through them all in detail, Your Honor. We wrote

but a reply and then a supplemental reply. And Mr. Sheehan's declarations have been pretty exhaustive on the views here. But I do think that fundamental to this is Your Honor determining whether or not the views of the administrative agent, more than two-thirds of the required lenders under the DIP agreement and the debtors; whether our mutual interpretation of the agreement is in fact the Court's interpretation. Which is, can the debtors and the administrative agent and more than two-thirds of the required lenders under that agreement reach agreement about how and under what circumstances the remedies under that agreement will be pursued? To me that seems to me it's a yes or a no.

If the answer is yes, and we believe it absolutely is. We think it's absolutely crystal clear under the documents. If the answer is yes, then the question is, under the accommodation agreement, have the concessions or accommodations that the debtors have made in connection with that fundamental accommodation from the DIP lenders, are those agreements justified as a matter of business judgment? Did we have a rational business purpose for making the agreements that we made? And I would submit to Your Honor that the answer to that question is absolutely yes.

We have a legitimate business purpose for each and every item that we have undertaken here. And we are, as Mr. Sheehan testified, we are balancing, every day, in a very

complex situation the competing interests and demands of many stakeholders, including the differing competing interests and demands of our DIP lenders themselves who do not speak as a homogenous group but have very different views among themselves and disparate views of both how we should proceed here and what the ultimate resolution of this case ought to be. And it's our job, during this accommodation period, to bring all of those views together and we hope to do that through filing further plan modifications at the end of February. That is our goal and we have agreed with the participating lenders in the accommodation agreement, which any DIP lender could have signed up to be one of, we've agreed that they will have a look at the end of February and that they will be able to redirect the administrative agent if we are not able to satisfy them that we've accomplished that goal.

And Your Honor, I think, as you pointed out, but just to say it, while I respect Mr. Kirpalani in his advocacy, the fact is it's just not accurate that nothing is going to happen here on December 31st. There are material things that will happen. But if Your Honor approves this agreement, because we have obtained the contractual group of lenders under the DIP credit agreement to support us in the accommodation agreement, one thing that won't happen is there will not be a broken highway here which will cause people not to continue to support the company financially.

With respect to the interpretation of the agreements, I won't go through that in great detail but we believe that Section 2.28 and Section 7.01 are clear in their interpretation. And you do need to look at the context. Your Honor presided over this, you approved the rollup of Tranche C lenders, which were, in fact, the prepetition secured lenders, who, in the middle of this case, got rolled up from prepetition status to post-petition status. And that was, from their perspective, an extremely important event because it prevents, for example, the debtors from classifying and modifying that debt as part of a reorganization plan. They have significant benefits they got for that rollup in addition to us having paid over a billion dollars in fees, expenses and interest to the post-petition lenders since we filed Chapter 11. They've had that benefit as well.

What they don't have is the benefit of being able to vote on everything. What they don't have is the ability to complain when the “required lenders,” which they knew from the outset, excluded them when the required lenders have decided to amend the agreement, have decided to forbear on remedies, have decided to take other action authorized and relegated to them under the terms of the DIP credit agreement, they simply don't have a voice.

That does not mean, Your Honor, that their views are not important to us. And as the testimony and this record

indicates, we have spent weeks trying to negotiate concessions and accommodations that would make our Tranche C lenders as comfortable as they could be in going forward. We weren't fully successful in that, as is obvious by some of the objections that have been filed here today. But the reality is, we're going to be continuing to work with them during the accommodation period, if Your Honor approves this, towards a consensual plan of reorganization. And therefore trying to be transparent to them, trying to consider their views and incorporate those which we believe we could while balancing the interests of other stakeholders, the A/B lenders, General Motors, the administrative agent, the company, other parties who are providing post-petition unsecured credit to the company, balancing all those things trying to make sure that we reached an appropriate balance.

That's why, Your Honor, and Mr. Sheehan has testified, we believe that the payment of fees, for example, consent fees, to Tranche C lenders who submitted their pages by the deadline last week ought to be on and is an appropriate use of the fees. It represents somewhere in the neighborhood of about twenty percent of the total fees that are being paid if Your Honor approves this transaction.

But I think, Your Honor, in terms of the basic construct, if Your Honor agrees with our view of the DIP credit agreement, which, as I said, I think is the appropriate view

here -- one that the required lenders and the administrative agent support as well as, by the way, both statutory committees believe that's what the deal is here as well -- once you reach that conclusion, then I believe the rest of the agreements here follow from that. And I think that the record is uncontroverted on the business judgment that the company used.

Now a word about adequate protection --

THE COURT: Before you get to that, what the objectors contend is that, particularly with regard to providing the additional collateral for another 200 million of hedging obligations, that that is not an appropriate exercise of business judgment because, I gather, the belief that it's not in the economic best interest of the hedging parties to do anything about a cross default.

MR. BUTLER: I think, frankly, that is pure speculation on behalf of the objectors. In the economic world that I live in, right now that we all live in, and the negotiations I've been involved in, this and other transactions, the fact of the matter is that people -- that parties are crystallizing obligations and trying to mitigate against them as quickly as they possibly can. And I have every reason to believe that there is a significant risk that one or more of the hedge lenders, if left to their individual action, which they would be entitled to do, and I believe, by the way, in the issue of transparency I think JPMorgan filed a

supplemental reply today reiterating again, because it wants to be transparent to this Court. It's not trying to mislead anybody. It's operating as an administrative agent, as a lender and as a hedge provider which it's authorized to do.

In fact, as much as we've been criticized about the hedge lending thing, the reality is the contracts among all of these lenders are that the hedge lenders have to be Tranche A and B lenders, the credit agreement requires it. It's not a surprise or a secret that they have the hedge exposure because that's the only way you can have it under the agreement. It was contracted for in that matter. And they, I think, have been completely transparent to this Court and to the parties that while they are prepared to meet the requirements we have asked for in this accommodation agreement that they forbear from termination even though they're otherwise to do so on December 31st. Because that, by the way, is another element of the fact that the maturity date comes due. When the maturity dates occurs they will have that right. And it is an individual decision not a collective action issue.

We were able to obtain, and it was difficult to obtain, this agreement among all six lenders because each of them had the individual rights. We were able to negotiate a scenario in which all six hedge providers have agreed not to crystallize whatever may be due and would otherwise be due and owing if they terminated on December 31st.

The arguments or what Your Honor acknowledged to be the case law in this district, I have spent a lot of time talking with the objectors about because I do not believe this company ought to be getting in the business, these debtors, of not paying their administrative obligations as and when they become due in the ordinary course of business unless they have reached agreements permitted under contracts that allow them to do that. And this DIP agreement allows us to do it; the hedge agreements did not. And we're otherwise paying our administrative expenses as they become due and that's important to continue to be able to enjoy the support of our administrative creditors and our suppliers and customers and others. We have to be able to continue to do that.

So Your Honor, I think that we're doing precisely what the agreement allows us to do. I believe that we have made -- it's easy when you're sitting in a particular chair that's not the fiduciary chair to say why don't you bet the ranch. We're trying to make the most careful, most calculated decisions as possible as this management team is navigating through this extraordinary economy right now. And we think we are on a course here that is appropriate and that will provide the, as we said, the appropriate liquidity runway to our other administrative creditors.

Does that answer your question, Your Honor? Can I go on to the cash collateral?

THE COURT: Yes. You were going to adequate protection.

MR. BUTLER: Adequate protection?

THE COURT: Yeah.

MR. BUTLER: We make it clear in our papers that we do not believe that the Tranche C lenders are entitled to adequate protection for at least two reasons. One of them is that this is a post-petition agreement and we were not able to find, and Mr. Kirpalani's quite correct if I could have found a case that addressed post-petition adequate protection I would have cited it. I think he would have cited as well if he could have found one going his way. The fact of the matter is, I don't think either of us found cases on this point that indicated that post-petition interests are subject to adequate protection.

I think the reason for that is that they're subject to contract. The fact of the matter is that the contract provides, quite clearly, the consent of the lenders for us to be able to use our collateral and operate our business pursuant to the terms of the credit documents. And in our view no individual DIP creditor or DIP lender -- no individual lender is entitled to seek adequate protection independently, that has to be done through the administrative agent as directed by the required lenders, or, absent such a direction, in the discretion of the administrative agent.

So we don't believe that it's available on a post-petition basis. And secondly, we believe the contract that has been approved by this Court represents a consent which would, even if it were available on a theoretical basis post-petition, in this case under these circumstances it would not be available.

Even so, Your Honor, we recognize and we said in one of our reply papers we recognize that we spent five weeks negotiating with our Tranche A, B and C lenders a whole series of concessions by the company that look a lot like adequate protection, in terms of all the things we've agreed to do. And they're spelled out quite clearly in the accommodation agreement, quite clearly in the papers. I'm not going to recite them all here. And so if by chance Your Honor disagrees with the debtors' views on adequate protection, I think you can still find that we have, in fact, provided adequate protection. Seeing as if you decided that way that would be our burden, but we think it's pretty clear, frankly, under the contract that these DIP lenders -- the changes we're proposing and the things we're proposing to do, the amendment of the basket under the DIP credit agreement which has been approved by the required lenders today that's all done as a matter of contract. And we believe it's pretty clear.

So on that point I don't know if Your Honor has any other questions.

THE COURT: On the topic of the concessions that the debtors have provided to the Tranche C lenders, in terms of the actual out-of-pocket cost, that's now severely lower than it was before, right?

MR. BUTLER: Yes, Your Honor. The actual amount that will be paid is probably twenty-five percent of what could have been paid, something in that neighborhood.

THE COURT: The other things are, like, granting additional liens and agreeing to some foreign liens, is that correct?

MR. BUTLER: Correct. I mean, I think one of the basic ones, Your Honor, under the terms of the waterfall; again another effect, post maturity date, is that interest isn't paid to the Tranche C lenders under the terms of the agreement. We've agreed not only to increase the interest rate, because that is -- I won't call it an agreement, we think that's an operation of the credit agreement. But at an additional 200 basis points we have agreed to deposit that into a segregated account with the administrative agent. Granted, the A's and B's have to get paid off before that would go to the C's, but it would be sitting there in an accruing account and accrued under the terms of the accommodation agreement.

That, I think, is one of the most fundamental issues. But in addition to that we've agreed to limitations on repatriation from global affiliates. We've been able to obtain

the forbearance of hedge parties under independent agreements that they have with us. There is a provision for paying down, irrespective of the borrowing base, I believe it's at least eighty million dollars during the term of the accommodation agreement, if I recall correctly. We have reduced the amount of permissible secured indebtedness on the debtors' foreign subsidiaries by 500 million dollars, from 1.5 billion to a billion. We have pledged all of the balance of the equity interests of our foreign subsidiaries through a new collateral pledge of a hundred percent, up from sixty-five percent. We have agreed that if we settle the current plan investor litigation that under the terms described in the accommodation agreement that proceeds would be used to repay the DIP facility.

We have provided changes to the thresholds for asset sale sweeps. We have entered into a mechanism that requires us to use commercial and reasonable efforts to contest and cause our foreign subsidiaries to contest any efforts for certain regulatory claims to be made in non-U.S. jurisdiction. We have provided that an inter-company note that exists will be secured -- obligation will be secured by one of the foreign holding companies under the terms specified in the accommodation agreement. And we've also established a new minimum liquidity covenant, among other things. There are other agreements set forth in the accommodation agreement about how we will perform

and conduct our business.

All of those agreements by us, which have been carefully negotiated by the administrative agent and voted on and approved by the required lenders, inured to the benefits of all of the lenders.

The other point I'd simply make, and I know Mr. Kirpalani and his clients don't like my arithmetic sometimes because they say GM would have to do it anyways. But as we put these transactions together and our papers indicate that the motion Your Honor already approved and this motion, in some respects, are companion motions because we've been able to negotiate with General Motors to provide up to 600 million dollars of additional liquidity. Three hundred million of that is through a change in payment timing in the first and second quarters of next year. The balance is subordinated funding from General Motors, up to 300 million dollars of it.

And so even if you believed, somehow, that the 200 million dollar basket in the A's was being crystallized and that it was actually going to be used, and we provided -- in the evidentiary record there are charts that show how that trails off over time and just the passage of time reduces this exposure -- If you look at that, even if you assume that was going to be crystallized for the full amount worst-case basis, we provided during this period 300 million dollars worth of subordinated funding to the estate which is going to be used

for the benefit of maintaining this estate and maintaining the value in this estate, which inures, first, to the DIP lenders.

And so while the arithmetic may not be perfect, in Mr. Kirpalani's view or his client's views as he urges us to do, the substance of the transaction, as a whole view, the substance of this transaction is, I think, again compelling. It provides a liquidity runway. The liquidity is coming from people other than the DIP lenders. And it provides a series of very specified agreements that during this accommodation period the debtors would be obligated to do in order to continue to earn the forbearance from the Tranche A and B lenders, the required lenders, that have voted in favor of this.

And from a voting perspective, as Your Honor pointed out, we have not altered the DIP credit voting mechanism. We have, as to accommodation matters only, indicated, like for example the milestone in February, we have adopted some different voting mechanics which we're entitled, we believe, to do under the construct of the agreement.

Your Honor, I think the only other matter that I wanted to address today, briefly, and we did it in the cross examination or the redirect of Mr. Sheehan is the subject of somehow that the company is not using appropriate business judgment in authorizing the payment of fees. And the fees that we're paying in connection with this accommodation agreement are about half, a little less than half, of what we had been

paid in the context of an extension. The truth is --

THE COURT: You mean what you've previously paid?

MR. BUTLER: Yes. The truth is that we have paid hundreds of millions of dollars to our DIP lenders, including the Tranche C members, over the course of the last two and half, three years as we have entered into the DIP and then continued to extend the DIP, we have paid substantial fees. And in each of those cases we have paid arranger fees. I think arranger fees, from my experience Your Honor in this district and elsewhere, are usual and customary in these large transactions. They tend to go to the folks at the top of the book in terms of -- and they are negotiated. We typically -- what we do is sit down with the lead arranger and we negotiate a fee for the lead arranger and then a bucket or basket of fees to be used as needed in connection with the syndication and with procuring consents or whatever else needs to be done to affect the transaction. And we worked with the agent about how we should in fact spend the money.

As Your Honor knows from the record here, particularly Mr. Sheehan's supplemental declaration, we did not spend all the money we agreed to spend with the lead arranger here, in terms of arranger fees. We were able to negotiate what we needed to get done to be able to get this agreement completed and presented to Your Honor for less than the amount we originally had estimated. But there is nothing that is

unusual or not customary or somehow undue, inappropriate, in connection with the payment of arranger fees in these economic transactions. They're done all the time.

I guess, on behalf of a company and an issuer I'd love to have a market where they weren't. I would, as an issuer's counsel, applaud that market, but I haven't found it yet. And while Mr. Kirpalani made some comments about the fees that his clients did not request, and I'm certainly not going to discuss settlement negotiations on this record, but I suspect before we are done in this case Mr. Kirpalani's clients will be seeking fee compensation from this Court. But that, I think, today is not for today but I did note Mr. Kirpalani's statement on the record about that.

Unless Your Honor has specific questions, I think we'd otherwise rely on our papers.

THE COURT: What in the record would support my not -- I'm sorry. What in the record would support my ordering that the ten day stay, under 6004(g) shouldn't apply?

MR. BUTLER: There are two reasons, Your Honor, in the record. One, and they're both in Mr. Sheehan's declaration and in the record. One is that the accommodation agreement itself requires an unstayed order be entered and be done by December 4th. We were able to extend that date.

THE COURT: But an unstayed -- I read that to mean it's not been enjoined as opposed to -- I mean the Rules say

what they say.

MR. BUTLER: I understand. I'm not sure that's what was intended, Your Honor, by that provision because we tried to negotiate a later date. And the other point of it is, and the one that I think is important I made it in my comments at the beginning, and that is that we are here, primarily, to provide stability for this case and a record upon which our administrative creditors can continue to support the company.

We already have, right now we're dealing with our trade creditors who have shipped goods to us who have payments due later this month and who we're asking to ship goods to us now that will have payments due in January. My own belief, Your Honor, is that there is a substantial risk to the estate, and Mr. Sheehan, I think, discussed in his declaration, that we need to have this order affective and be able to get it out to our administrative creditors who provide ordinary course commercial credit to the company in order to not have a destabilization of that support.

THE COURT: Well I guess the question I have on that is, as you pointed out, the DIP lenders are not providing the liquidity here. What's happening is forbearance. So it's not as if you're waiting for a slug of credit to come in tomorrow. I would think that if a --

MR. BUTLER: But we are.

THE COURT: Well --

MR. BUTLER: I mean, that's the point. What's happening here is we have an environment where our suppliers --

THE COURT: Oh no, I understand your suppliers are providing the credit.

MR. BUTLER: Right.

THE COURT: But they would see that I've entered the order, if I choose to enter the order. They'll see that I've approved it. Congress said there should be a ten day waiting period unless the Court, for cause, orders otherwise but the order's there.

MR. BUTLER: Right.

THE COURT: And to be actually stayed on appeal, for example, the appellants would have to establish the basis for a stay, which would probably include a bond. So it just seems to me that the message that would be sent to the suppliers is that you would have a forbearance agreement that's actually been approved.

MR. BUTLER: And you would have people ship to the company during the stay period in the hopes that --

THE COURT: Yes.

MR. BUTLER: -- it all works out?

THE COURT: But when you say it all works out, it's not as if the order isn't entered and doesn't exist. It's that Congress has put -- the whole point of 6004(g) is to end some of the pressure because of mootness in connection with sales

and the like. Here it's forbearance as opposed to providing new credit. So I'm just not sure why they shouldn't be allowed to have their ten days to take a more reasoned approach to whatever rights they have as the people who lost on a contested matter.

MR. BUTLER: Your Honor, first of all I think the accommodation agreement, as you indicated, has a number of agreements. It's not just forbearance; I might have wished that it would have been. But it has a variety of transactions that we need to undertake as a result of implementing the accommodation agreement. But it's tied --

THE COURT: Well, what are they?

MR. BUTLER: There's a whole bunch of things we do when we close the accommodation agreement, Your Honor. There's a whole bunch of covenants we have to provide. We have to start putting up cash collateral. We have to start doing a series of things that we will have to do. The Tranche A commitments expire immediately.

Under the terms of the accommodation agreement, what we negotiated with the required lenders, is that the Tranche A commitments expire as soon as the agreement becomes effective.

THE COURT: Well, what does that mean under 6004(g)?

MR. BUTLER: Well, Your Honor, as I've always read 6004(g) all the debtor is required to do is to demonstrate cause. Having someone say please don't do it, Judge, is in

opposition to the case the debtors have put on.

THE COURT: Generally speaking, unless it's an emergency, people who put up an objection should have the right of that ten days, I think. Maybe I'm missing something in the agreement but this does not seem to me to be the type of situation where the debtor is facing a business deadline that requires a closing of a transaction to get cash in or to get rid of a white elephant.

MR. BUTLER: Your Honor, I think it's accurate to say that the transactions under the accommodation agreement can be implemented ten days from today as opposed to tomorrow. I also believe that the value of the estate will be maximized if the order is entered tomorrow. And I have always read 6004(g) cause to be broadly defined, not transactionally limited. And it seems to me that the Court, in light of the uncontroverted testimony that Mr. Sheehan has given in his declarations, it seems to me that the company has demonstrated very good cause about getting this liquidity runway out there and clear and something people can rely upon in order to be able to provide us the support we need right now.

THE COURT: I wouldn't create -- I don't think one should have the impression that you can't rely upon it. If I issue an order, it's an order. I don't think Congress meant that you can't rely upon something; it just said that you have to have ten days to --

MR. BUTLER: I think I've said all I can say about this without creating more of a problem.

THE COURT: All right.

MR. BUTLER: I think I've described the exigencies that the company has and it seems to me that if Your Honor is inclined to grant the relief, the estate is best served by granting the relief immediately.

THE COURT: Okay.

MR. BUTLER: Thank you, Your Honor.

THE COURT: Any brief response? Nothing that shocked you that you feel you have to --

MR. KIRPALANI: I can do it from here, Your Honor, just to save time.

THE COURT: Okay.

MR. KIRPALANI: It's not that anything shocked me, but a couple of things. First, I think this is important to Your Honor's ruling, 7.01, and I know we've talked about this during my argument but I'm not sure I made the point clearly enough, 7.01 by its plain terms does not permit the required lenders to direct the agent not to exercise remedies. What 7.01 says is that upon an event of default the agent may or the required lenders shall -- I'm sorry, or at the direction of the required lenders the agent shall exercise each one of them is a punishment to the debtor. Each one of them does something damaging to the debtor, right? The first one to cash

collateralize LC's, I'm going from memory but Your Honor gets the point.

The forbearance concept, although Mr. Butler very eloquently talks about how this was all part of the grand scheme of the credit agreement actually is missing. Now, I think Your Honor understands this to be more of an argument as to what's implicit as opposed to explicit, but I think that's an important thing because I want to make sure Your Honor understands our position. Which is, 7.01, to the extent it's a limitation on remedies or a limitation on the lenders' rights in Section 10.07 says all rights are cumulative, it should be construed narrowly not broadly as Mr. Butler prefers.

And Your Honor, the other thing is with respect to the DIP order. I took another look at it. Your Honor had asked about 13(b) as a purge to 13(a). And 13(b), Your Honor, if we just take a look at it, all it says is unless all DIP obligations have been paid in full the debtor shall not seek, and it shall be an event of default and a termination of the right to use cash collateral to seek, modifications or extensions unless permitted by the administrative agent. It's not a provision that confers rights.

THE COURT: What about their “unless” language: Unless the administrative agent says otherwise?

MR. KIRPALANI: All that says is that that does not cause an immediate event of default and termination of cash

collateral usage. It doesn't confer rights on the agent. All it says is this will -- if the debtor does X, Y or Z it's an immediate event of default or it's an immediate termination of the use of cash collateral unless the agent has agreed to it. And we're not arguing that this is an immediate event of default. We're not arguing that this is a termination of cash collateral. That is happening anyway on December 31st, Your Honor. We're not arguing that that's what applies here.

Those are the only two points I wanted to make, Judge.

THE COURT: Isn't it implicit that if the debtors are contemplating an event of default that they get the prior written consent of their agent or try to, to modify the order?

MR. KIRPALANI: They are not -- they're specifically not waiving the event of default.

THE COURT: But they are seeking a modification of the order.

MR. KIRPALANI: All I'm saying is this is not -- in my reading, Your Honor, it's not an empowering provision of the DIP order it's a restricting provision of the DIP order as to what the debtors can and can't do. It says the debtors cannot -- it will automatically cause an event of default and termination of cash collateral usage if it seeks to do something without the consent of the administrative agent. That to me does not mean that the administrative agent and the

debtors can write the prior paragraph, (a), out of the order.

THE COURT: You don't think that it means, in that clause, “any modifications or extensions of this order without prior written consent of the agent,” you don't think that means that the prior written consent of the agent can lead to a modification of the order?

MR. KIRPALANI: I think, Your Honor, it has to be read next to (a). It is a conferring right. The whole Section (b) is what the debtors can't do and shall not seek to do because if they do it will be an event of default and an immediate termination of cash collateral.

THE COURT: I agree with that, but, again, there's an exception.

MR. KIRPALANI: I understand, Your Honor. Our interpretation of this is that that exception does not swallow paragraph (a).

THE COURT: So what is the agent supposed to be consenting to?

MR. KIRPALANI: It is things that are otherwise permitted by the order, Your Honor or permitted by the credit agreement.

THE COURT: Well why would you need their consent then?

MR. KIRPALANI: Your Honor, it is written with “any modifications or extensions of this order.” I don't read any

modifications or extensions of this order to mean priming liens and things of that nature.

THE COURT: But that's the most important provision of the order. I mean, that's what you're relying on, is that provision.

MR. KIRPALANI: My reading of it, Judge, and I understand if you're disagreeing with me but for the record my reading of this -- this is not carte blanche to the agent to go ahead and prime.

THE COURT: Oh no. The agent has to still comply with the credit agreement, obviously.

MR. KIRPALANI: Okay.

THE COURT: The agent's not going to willy-nilly just say you can change the order. The agent only exists pursuant to the authority given to it under the credit agreement. Its powers are only found there.

MR. KIRPALANI: I appreciate your explanation, Your Honor. I just think that (a) and (b) read together, (a) is a much stronger right and (b) is just a limitation on what the debtor can do.

THE COURT: Okay.

MR. KIRPALANI: Thank you, Your Honor.

THE COURT: Well, I'm going to take a brief break. Do you have something to say?

MR. FLYNN: No, Your Honor.

THE COURT: You're not going to waive one of those fees?

MR. FLYNN: No, I just wanted to talk to Mr. Butler about something, if we can just have one minute.

MR. KIRPALANI: Judge, I'm sorry. One thing I wanted to mention, I don't think any of the objectors has seen a proposed form of the order. And that's something, depending on how Your Honor rules, we certainly want to --

THE COURT: I think there was a fairly plain vanilla form that was attached to the original motion.

MR. KIRPALANI: Okay.

THE COURT: Yes, there was one. It's DIP accommodation order.

MR. KIRPALANI: Okay. Thank you, Your Honor.

THE COURT: It's fairly brief, eight pages.

MR. FLYNN: Your Honor, I thought maybe Mr. Butler and I could settle something outside.

THE COURT: You should state who you are for the record.

MR. FLYNN: My apologies Your Honor. I'm Michael Flynn on behalf of the administrative agent, from Davis Polk & Wardwell.

I rise only, Your Honor, to address the issue of the stay that you were discussing with Mr. Butler. If you look at paragraph 35 of the accommodation agreement there is a

provision in there, conditions to effectiveness, that talks about the accommodation agreement becoming affective under certain conditions. And (iv) deals with the entry of this Court's order and it also mentions that that order shall not have been "reversed, stayed or vacated." So I just wanted to point that provision out to Your Honor. The administrative agent hasn't had a chance to look at the Rule and consider the operation of that.

THE COURT: I view those types of provisions as things where someone has actually persuaded a Court to stay, as opposed to a statutory stay, which is in the Bankruptcy Rules.

MR. FLYNN: Understood. That was the point, Your Honor. I just rise to say the administrative agent hasn't decided whether it views that the same way and whether or not it would require a waiver from the people who have agreed to enter the --

THE COURT: When you look at the other words that are in that string, they all have to do with some court taking an action: vacating, staying, etcetera.

MR. FLYNN: I appreciate Your Honor's interpretation of it. I just wanted the administrative agent's position to be clear on the record, that we haven't yet formed a view as to whether or not the conditions to effectiveness will have been met if the operation of the Rule applies and you do not grant Mr. Butler's request to waive that application of the Rule.

THE COURT: Okay.

MR. FLYNN: All right.

THE COURT: I'm going to take a break until -- effectively with all these people five minutes doesn't really work so until 3:00 and then I'll rule.

(Recess from 2:38 p.m. until 3:03 p.m.)

THE COURT: All right. I have before me a motion by the debtors-in-possession for approval of their entry into an accommodation agreement, which, in its original form, was attached as an exhibit to the debtors' motion but that has since been modified so that what I am currently asked to approve is the form of the accommodation agreement that was filed with the Court on November 26th.

The accommodation agreement is clearly an agreement entered into by the debtor with respect to the use of its property that is out of the ordinary course of business and therefore requires approval under Section 363(b) of the Bankruptcy Code.

In addition, as the five objectors to the debtors' motion have argued, the debtors' entry into the accommodation agreement raises the issue of the debtors' contractual authority to enter into the agreement and the objectors' rights, even assuming that the debtors have authority to enter into the agreement as secured debtor-in-possession lenders.

The Court issued an order approving post-petition

financing and authorizing the debtors to refinance secured post-petition financing and prepetition secured debt on January 5, 2007, and I'll refer to that as the "DIP order". Among other things, the DIP order provided for, as its title stated, a roll-up of the debtors' prepetition secured debt facility, in the context of a refinancing of the debtors' post-petition facility, into a third-priority so-called "Tranche C" post-petition facility. In other words, the prepetition rights of the debtors' secured lenders were altered by the DIP order, which, pursuant to its terms, turned them into -- or turned their claims into -- post-petition superpriority unsecured claims.

The DIP order authorized the debtors' entry into a DIP facility agreement, and both the agreement and the order have subsequently been amended twice. The primary amendment, or at least the amendment that is most relevant to the matter before the Court this afternoon, is an extension -- or was an extension of the maturity date of the DIP loans, including the rolled-up Tranche C loans. Most recently, that maturity date was extended to December 31, 2008, as required by Section 10.09 of the amended and restated DIP facility agreement. That extension of the maturity date required the lenders' unanimous consent, that is, the unanimous consent of the Tranche A, Tranche B and Tranche C lenders.

Because of, it appears to me, the turmoil in the

credit markets, the debtors have not been able over the last few months to obtain either commitments for exit financing that would enable them to emerge from Chapter 11 before the December 31st maturity date or to obtain a refinancing of the existing DIP agreement. This is, I imagine, not only somewhat mysterious to me but to most of the debtors' constituents since it appears to be undisputed that the debtor makes critical parts for a critical product, meaning the automobiles manufactured by OEMs throughout the world, including in the United States. Nevertheless, the credit markets appear to remain seized up and unable to evaluate the underlying credit characteristics of companies like Delphi, and, consequently, the debtors have had to consider their options in the light of the oncoming maturity of their DIP loan.

They attempted to obtain unanimous consent, again, for an extension of the maturity date, which would take them into a time when they would reasonably hope that the credit markets would be functioning rationally or smoothly and/or that some other source of credit support for their key customer or customers would become available. However, they were advised by the agent for the DIP facility, JPMorgan Chase, that it was unlikely that they would receive, this time around, unanimous consent for an extension of a maturity date. The debtors have therefore, instead, negotiated the accommodation agreement, which, in effect, acknowledges the forthcoming maturity of the

debtor-in-possession loan facility but provides for, under the conditions stated therein, forbearance from exercising remedies under the DIP credit agreement and DIP order.

Pursuant to their interpretation of the DIP credit agreement, which was also an intercreditor agreement setting forth the agreements between and among the three tranches covered by the DIP credit agreement and the DIP order, as to their priorities and rights in the event of a default -- the debtors contend that they have the contractual right to enter into the accommodation agreement provided that the so-called "required lenders" vote in favor of the accommodation agreement. It is uncontroverted that, as of the applicable voting date on the modified accommodation agreement, 68.37 percent of the Tranche A and B lenders have confirmed or reaffirmed their agreement to abide by the terms of the accommodation agreement, which percentage not only equals, under the definition section, the defined term "required lenders", but also exceeds the two-thirds amount necessary, arguably, for certain amendments to the DIP credit agreement.

There have been five objections to the motion, four on behalf of various Tranche C lenders, although it has been represented to me that some of the members of the so-called "Tranche C collective" have since consented to the accommodation agreement, as well as one group of Tranche A and B lenders, although, again, it's been represented that some

parties within that group have consented to the accommodation agreement. The objections essentially raise three points. The first is that the debtors and the required lenders lack the contractual authority to enter into the accommodation agreement and thereby limit the remedies and rights of DIP lenders who have not agreed to the accommodation agreement; secondly, that the DIP order and secured lenders' right to adequate protection, under Sections 361 and 363 of the Bankruptcy Code, preclude the debtors' entry into and performance under certain aspects of the accommodation agreement. And the third objection is that even if the debtors have authority, contractually and legally, to enter into the accommodation agreement, the debtors' particular exercise of that authority here is not a valid and legitimate and proper exercise of their business judgment.

Let me address those objections in order. The agreement, that is, the DIP credit agreement, was negotiated at arm's length by sophisticated parties who not only were negotiating with the debtor but also negotiating mindful of the intercreditor aspects of the agreement. Under Section 10.06, the agreement is governed by the law of New York, except where federal bankruptcy law applies. The parties also submitted to the Court an extensive forty-page DIP order in January, which has subsequently been modified by orders of fewer pages but that reflect an equally sophisticated and arm's length

negotiation and documentation of the lender parties' rights, both against the debtor and inter se.

I have reviewed the DIP agreement carefully in light of the parties' arguments, and I conclude that the debtors do have the authority under the DIP agreement to enter into the accommodation agreement. I say that first in light of Section 7.01 of the DIP agreement, which covers and prescribes the parties' rights upon the happening and continuance of an event of default. Specifically, it covers not only events which become events of default for occurrences where the amount due under the agreement may be accelerated but also specifically default in the principal -- in the payment of the principal -- of the loans or reimbursement obligations or cash collateralization and respective letters of credit when and as the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment thereof or by acceleration thereof or otherwise. I.e., the default provision, Section 7.01, covers an event of default upon the expiration of the maturity date when, as provided in Sections 2.13 and 2.28, the loans become due and payable in full. Section 2.28 expressly subjects the payment provision upon maturity, among other payment obligations, to the provisions of Section 7.01. Section 2.13 does not. However, there is no other provision of the agreement dealing with rights in respect of an event of default, including a payment default upon the

maturity of the loan, except Section 7.01.

Section 7.01 then goes on to specify that, "Under such circumstances, the administrative agent may and, at the request of the required lenders, shall", skipping ahead to (v), "exercise any and all remedies under the loan documents and under applicable law available to the administrative agent and the lenders." I believe that under New York law, having been given the right that I just quoted, the administrative agent, in its discretion and mandatorily at the request of the "required lenders," has the right to exercise such remedies or forbear in respect of such remedies as a matter of contract under the DIP credit agreement, which, I believe, is what it is doing, having been so instructed, in the accommodation agreement.

The objectors contend that, given the anticipated maturity of the loans at the end of this month, they individually have the right to act to enforce Delphi's payment obligation, but I conclude that the agreement itself does not provide them with that right. And under New York law, the remedy provision of the agreement provides, instead, that right to be exercised by the agent, either in its discretion or at the direction of the required lenders. Therefore, I believe that, in entering into the credit agreement or by purchasing Tranche C or A or B loans, each DIP lender agreed or knew that it would be subject to such a limitation on its right to act

unilaterally to, for example, sue the debtor for breach of the DIP agreement. I believe this conclusion is directly supported by the recent decision of the New York Court of Appeals in Beal Savings Bank v. Sommer, 8 N.Y.3d 318, where a particular lender sought to sue for breach of contract, and the Court of Appeals, construing a remedies provision quite similar to Section 7.01, concluded that that provision precluded the individual creditor's exercise of its breach of contract remedy. The Court so held even though the forbearance by the required lenders in that case had a "similar effect" to an action under the credit agreement that would have required unanimous approval. Clearly, the Court of Appeals was aware of the argument, which is also made here by the objectors, that the remedies provision did not expressly state that individual lenders were prohibited or precluded from exercising their own remedies. I say that because the dissent of Judge Smith makes that very point and states, in dissent, that "a bank that lends money to a borrower and is not repaid is entitled to sue to gets it money back." Notwithstanding that view, argued cogently by Judge Smith, the majority concluded that the remedy provision, in light of the intercreditor nature of the underlying agreement, did, in fact, do just that, i.e., precluded the individual lender from suing to get its money back.

The objectors have pointed to a footnote, footnote 3,

in the Beal Bank decision, which suggests that, for the future, parties should expressly state their intention with regard to whether remedies are to be precluded or not. But just as the parties in Beal Bank did not do so, and the Court concluded that under the law of New York the agreement should be read to have that preclusive effect, it seems to me that, in the absence of declaring their intention, the same logic would apply here.

It also appears to me that, having been accorded the right to exercise remedies, including in respect of a default of payment on the maturity date, the agent, at the direction of the required lenders, also has the authority either to compromise or to forbear in respect of those remedies, except as expressly precluded by the agreement, and that the forbearance here is not expressly precluded by the agreement. See In re Delta Airlines, Inc., 370 B.R. 537, 548 through 9 (Bankr. S.D.N.Y. 2007), affirmed 374 B.R. 516 (S.D.N.Y. 2007).

The objectors point to Section 10.09 of the DIP credit agreement, which is the provision dealing with amendments, modification and waivers, and note, which the debtor does not dispute, that under that provision, although most provisions of the DIP credit agreement may be amended, modified or waived at the instruction of the required lenders, an extension of the final maturity date requires unanimity. They state that, for all practical purposes, the final maturity

date is being extended here by the forbearance on exercising remedies and, therefore, that the debtors' entry into the accommodation agreement and the agent's and the required lenders' agreement to forbear is unavailing. I believe there are two problems with this argument. First, the accommodation agreement does not, by its terms, extend the maturity date -- and this is not mere verbiage. The consequences of the nonextension of the maturity date have a material economic effect on the debtor. The Tranche A commitment terminates, interest accrues at a higher rate and the debtors lose their LIBOR interest option, and the debtor must cash-collateralize letters of credit that would otherwise not require such cash collateralization. Secondly, as Chief Judge Kaye pointed out in Beal Bank, the fact that forbearance has a similar effect to extension is insufficient to override the parties' agreements with regard to collective action to enforce their respective rights under the DIP credit agreement.

It's also suggested that, in addition to having the effect of extending the date by which the debtors would actually have to pay under the DIP agreement, the accommodation agreement also violates the DIP credit agreement and the DIP order by recognizing the debtors' grant of an additional 200 million dollars of -- or acknowledgment of an additional 200 million dollars of secured debt for outstanding hedging obligations. The debtors have argued that they have the right,

in fact, the duty, to extend the lien under the DIP order at a Tranche A priority to cover such obligations. But whether or not they do have such right or duty, I believe that under Section 10.09, with the consent of the required lenders, they have the ability to amend the DIP credit agreement to do so. It is not -- such action is not within the limited group of actions that require either unanimous or additional consent. It is argued that the provision (v) -- I'm sorry, in (iii)(c) requires such consent to amend or modify the uppercase “superpriority claim” status of the lenders contemplated by Section 2.25 of the DIP credit agreement. However, the defined term "superpriority claim" expressly, in the definitions section of the DIP credit agreement, pertains to just that, the administrative claim priority, and does not refer to the lien priority or the lien rights of any particular DIP lender.

It was argued also that modifications of the borrowing base are provided for in the accommodation agreement and accordingly require the consent of a supermajority class. However, I believe it is acknowledged that the 68.37 percent vote gets over that hurdle, if such a hurdle, in fact, exists.

Consequently, I believe that, as I said before, the debtors, in fact, do have the right, assuming they get the requisite consents that they have received, in fact, here, to enter into the accommodation agreement and obtain the forbearance of the DIP lenders. This is a different situation

than, again, an amendment of the extension date -- I'm sorry, an extension of the maturity date by amendment or modification or waiver. I, therefore, do not find applicable or relevant Citadel Equity Fund Ltd. v. Aquila, Inc., 371 F.Supp.2d 510 (S.D.N.Y. 2005), which involved a waiver. Indeed, it seems to me that, just as in that case, the existence of a payment date that could not be waived triggered certain rights, the existence of that date here triggers certain rights, i.e., the right to default interest at a non-LIBOR rate and the other rights that I have specified, where there is no forbearance, nor could there be forbearance, as well as rights upon which there can be forbearance, including the right to demand and obtain, either by foreclosure or by simple pursuit of a breach of contract action, payment through judgment and enforcement.

It's also argued that the DIP order precludes the debtors from including within the Tranche A priority lien the additional 200 million of potential hedging liabilities. The DIP order clearly provides that no claim or lien having a priority superior to or pari passu with those granted by this order to the agent of the DIP lenders shall be granted or allowed only while any portion of the financing or the commitments or the DIP obligations remain outstanding. That's in paragraph 13(a).

However, it also provides, in paragraph 13(b), that the debtors shall not seek, and it shall constitute an event of

default, or if there is entered, any modification of this order, without the prior written consent of the agent. It seems clear to me that by including the phrase "without the prior written consent of the agent", the DIP order acknowledged the ability of the agent, and the requirement that the agent, in fact, honor the instructions of the required lenders, under the DIP agreement if they choose to amend the DIP agreement and that parties entering into the DIP agreement or purchasing a DIP loan were reasonably on notice of that possibility.

That also, I believe, addresses the second objection by the objectors, which is that the Bankruptcy Code entitles them to adequate protection of their lien interests given the fact that they, as Tranche C lenders, and, I suppose, those Tranche B lenders in the A/B lender group, as well, of objectors, would be primed by the additional amount of hedging debt included within the priority of the Tranche A lien. One can certainly read Sections 361 and 363 of the Bankruptcy Code as providing for a requirement of adequate protection not only to a prepetition lender but also to a post-petition lender. However, in this circumstance, where an agreement which includes, as among its primary features, an intercreditor agreement contemplates the very thing that is argued to me as giving a right to adequate protection and contemplates that thing being done, notwithstanding the desire of a lender that it not be done, I don't see how that lender can state that it

has not consented in advance to such action and, therefore, that it cannot contend that it is therefore entitled, notwithstanding its earlier consent, to adequate protection.

The debtors also point out that they have, notwithstanding their belief that they don't need to, included in the accommodation agreement various provisions that, in effect, offset the potential risk to the objectors entailed by being primed by the extra 200 million of hedging obligations and, in fact, arguably do more than offset that risk. Those include various commitments with regard to increasing the collateral package for all the lenders to cover equity in foreign subsidiaries, agreements on the limitation of liens on foreign collateral, a lien on litigation proceeds, various covenants, approximately eighty million dollars in pay-downs, and the like. In addition, the debtors point out that hand in glove with the accommodation agreement is an agreement by GM, their largest customer, pursuant to which GM would be providing an additional 300 million of funding subordinate to the lenders' claims, as well as acceleration of trade payments to the tune of 300 million, and that, were I to conclude that adequate protection was required here, such concessions in the accommodation agreement would be more than sufficient to equate to adequate protection for the impairment of the objectors' liens.

The objectors have disputed the actual value of the

GM commitment but have not really addressed the other issues in any detail, or the other concessions in any detail, or their value. It does appear to me, though, that these concessions have considerable value and are perhaps as difficult to value in this context as the ultimate risk that the collateralization of the extra 200 million of hedging obligations will ever have an actual economic effect to the detriment of the objectors. It does appear to me, however, that the blow of the amendment has been considerably softened by the concessions and the context of the accompanying GM agreement. However, fundamentally I conclude that, given the specified rights of the lenders, both against the debtor and among themselves under the DIP credit agreement, it would not be appropriate to accord to the objectors additional rights, which they had not previously bargained for, when, in fact, they agreed in the DIP credit agreement, and more specifically in the intercreditor provisions of it, that this type of amendment could be entered into.

That, I believe, leaves the last issue before me, which is the issue of whether the debtors have exercised appropriate business judgment in entering into the accommodation agreement and, in particular, agreeing to the concessions that they have agreed to in the agreement. Fundamentally, the agreement is objected to on this ground on the theory that, first, the debtors, if they stood up more

firmly to the counterparties to the hedging obligations, would not have to provide for an additional 200 million of those obligations to be subject to the Tranche A lien. The consequences of the debtors being wrong on that decision, however, i.e., playing chicken with the hedge fund counterparties -- I'm sorry, the hedging counterparties, to my mind, are very serious. Unlike the objectors, the hedge fund -- the hedging counterparties -- cannot be locked in place. They have not agreed in advance to accept limitations on the exercise of their remedies to be paid a hundred cents on the dollar in respect of an administrative claim, which is what they would have, I believe, upon the maturity of the loan occurring. In that event, they could demand payment and pursue their rights against the debtors, just as any other administrative creditor who has not limited its remedies can do. Not only would the debtors' failure to make such payment send exactly the wrong message to all of the parties who are providing it with trade credit, but also it would, I believe, start in motion a very risky set of events that could easily lead to the conversion of this case in light of the failure to pay administrative claims that are sought to be paid. Again, the debtors could have played chicken with the hedging counterparties, but the risks of doing so were quite large. In contrast, they did not have to play chicken with the objectors because of the provisions of the DIP credit agreement and DIP

order that I've already discussed.

Moreover, while it is true that the existence of 200 million dollars more of secured debt poses a risk to those who are below that level, that risk is crystallized only ultimately in a liquidation and, moreover, I believe, is subject to considerable reduction with time through the actual maturity date of the hedge contracts as opposed to the accelerated date that would ensue if the hedging counterparties did not waive their right based on the cross default provisions to terminate the hedge or the swap.

Faced, then, with that choice and those potential branches on the decision tree, I cannot fault the debtors' business judgment for agreeing, as they have in the accommodation agreement, with the parties whose agreement is necessary to them. Frankly, I had more of an issue with the accommodations that the debtors have extended to the parties whose agreement, I believe, was not necessary, i.e., those who don't fall into the “required lender” basket, including the objectors. But I'm satisfied, given the amendments to the accommodation agreement, which considerably reduced the out-of-pocket accommodations or cash flow accommodations to such parties, that were made in light of negotiations with GM and others leading up to the amendment on the 26th, that I believe the current concessions to all the lenders, including those whose consent is not necessary, fall within the debtors'

business judgment.

I have also considered what I believe to be the last business judgment issue raised by the objectors, which is the amount of the fees paid for the negotiation of entry into the accommodation agreement. Obviously, a debtor-in-possession wants to pay as few fees as it can get away with. Similarly obviously, I believe that in return for forbearance, as in return for an amendment, a debtor-in-possession, or any borrower but certainly a debtor-in-possession, will face the need to pay fees to those who are, in fact, forbearing. Here, the fees are consistent with fees that I approved in connection with the prior amendments to the DIP facility. In fact, it is represented to me, and without dispute, that they are approximately one-half of the fees that were paid in connection with the prior two amendments.

I conclude that fees not only for agreeing to an extension but for assisting in persuading parties to forbear and agree to forbearance are warranted. Indeed, more work is needed for forbearance, in my mind, than for an extension. Consequently, I believe that the fee for those who have agreed to forbear is appropriate and also that the fees for those parties who facilitated the accommodation agreement by assisting the debtors in obtaining the requisite consents are also warranted.

The last point covered by the parties is whether, in

fact, the debtors have shown sufficient cause for a waiver of the automatic ten-day stay under Bankruptcy Rule 6004(g) of -- and I guess now it's (h), an order authorizing the use, sale or lease of property. I am normally quite reluctant to authorize the waiver of such provision where there has been any meaningful objection to a request for the use of property out of the ordinary course. Normally, I do so in cases where there is an objection only where the debtor is expecting an infusion of funds and seriously requires such an infusion. This agreement is rather in the nature of a forbearance, as I've said, instead of a new extension of credit or an agreement to purchase, and, consequently, I don't see that fact pattern here. The debtors have argued that it's important for their other admin creditors, those who provide them on a day-to-day basis with trade credit, to see that they very clearly have a path well into 2009 to emerge from Chapter 11, notwithstanding the maturity of the DIP loan at the end of this year. I believe that my approval of their motion, as well as the companion GM motion, does that and that limiting the objectors' rights under Section -- or under Rule 6004 is not warranted in light of that fact.

I have reviewed the provision of the accommodation agreement that sets forth the conditions to its effectiveness, and I note that in Section 33(iv) it provides that the order be entered by the Bankruptcy Court in a form reasonably

satisfactory to the administrative agent on or before December 4th and that such order shall not have been “reversed, stayed or vacated.” I would have an issue with parties trying to force the Court's hand by a provision to get around Rule 6004(g) absent a true showing of cause, but I don't need to have those issues here because I simply don't construe the language that I've just read as applying to Rule 6004(g). Again, the phrase is "reversed, stayed or vacated". To my mind, that very clearly contemplates an action by a court, either reversing, staying, i.e., issuing an injunction to prevent, or vacating the Bankruptcy Court order. That's clearly not what 6004(g) does. Rather, I believe, it's implicit in the entry of the order.

So, consequently, I don't find cause here to deem Rule 6004(g) waived. I believe that the Court's approval of the accommodation agreement provides a level of assurance to the debtor's various constituents, including those providing it with trade credit, that, in fact, the DIP lenders will not be enforcing their rights under the DIP credit agreement, except under the conditions that the debtor has negotiated in the accommodation agreement, and that the debtor accordingly has achieved the opportunity that it sought to access financing to emerge from Chapter 11 in 2009.

The original motion had attached to it a form of the order approving the accommodation agreement, and there were

some provisions of it that specifically referred to the DIP order. I don't know if you've modified it in light of modifications to the accommodation agreement since then, but other than that, it seemed to me to be fine.

MR. BUTLER: Your Honor, we're reviewing the final form of it with the administrative agent, counsel of the administrative agent, okay, and I guess Mr. Bernstein wants to make a comment.

MR. BERNSTEIN: Don Bernstein from Davis Polk & Wardwell, on behalf of JPMorgan Chase. Your Honor, in light of your ruling on 6004(g), we would like to include a decretal paragraph in the order which says that the conditions to closing in the document shall not be construed to have applied to the stay under Rule 6004(g) unless the stay is extended beyond that period --

THE COURT: Okay.

MR. BERNSTEIN: -- in 6004(g).

THE COURT: That's what I would have ruled if someone raised that issue, so --

MR. BERNSTEIN: Okay.

THE COURT: -- that's fair.

MR. BERNSTEIN: Thank you, Your Honor.

THE COURT: Okay.

MR. SILVERSTEIN: Your Honor, may I be heard?

THE COURT: Yes.

MR. SILVERSTEIN: Paul Silverstein for M.D. Sass. We obviously objected. Paragraph 13 of the proposed order contains a 364(e) finding, which I think should be stricken because this is not a loan. It's not an advancement of funds. It's a forbearance agreement, as Your Honor characterized it.

MR. BUTLER: I think the objectors themselves indicated in their argument in their papers that 364 was implicated here.

MR. SILVERSTEIN: I didn't.

MR. BUTLER: And this is --

MR. SILVERSTEIN: I didn't, Mr. Butler.

MR. BUTLER: Maybe one of five.

MR. SILVERSTEIN: That's okay. It's the important one that counts.

THE COURT: I'm looking for it. What paragraph did you say?

MR. SILVERSTEIN: 13, Your Honor.

THE COURT: Well, my paragraph 12.

MR. SILVERSTEIN: Okay. I may not have the most recent.

(Pause)

THE COURT: I don't know. I'll have to think about that.

MR. SILVERSTEIN: Thank you.

THE COURT: Okay. As I often do when I give a fairly

lengthy bench ruling, I'll go over the transcript of the ruling not only for typos but in case I mangled my grammar or I wanted to say something else. And if that's the case and I change it, I'll attach the amendment to my order or file it separately, and that'll be my ruling as opposed to the transcript. But the ruling won't change.

I will consider Mr. Silverstein's 364(e) point. As often happens in these orders, it's said three different ways in that paragraph, and it may be that a couple of the ways are right and one of the ways is wrong. I don't know. I have to look at it more carefully.

MR. BUTLER: Your Honor, we'll also submit the proposed language for the decretal paragraph.

THE COURT: Okay, and you don't need to settle that order, but you should copy the objectors in your e-mail to the Court as well as the committee.

MR. BUTLER: We will. Thank you very much, Your Honor.

THE COURT: Okay. Thank you.

ALL: Thank you.

(Proceedings concluded at 4:16 p.m.)

I N D E X

T E S T I M O N Y

E X H I B I T S

R U L I N G S

C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

Esther Accardi

Digitally signed by Esther Accardi
DN: cn=Esther Accardi, c=US
Reason: I am the author of this document
Date: 2008.12.09 14:36:07 -05'00'

ESTHER ACCARDI

Veritext LLC

200 Old Country Road

Suite 580

Mineola, New York 11501

Date: December 3, 2008